IN THE

Supreme Court of the United States.

OCTOBER TERM, 1902.

NORTHERN PACIFIC RAILWAY COMPANY, *Petitioner*,
vs.
LOUISE H. ADAMS and FRANK H. ADAMS. } *No. 466.*

On Writ of Certiorari to the United States Circuit Court of Appeals for the Ninth Circuit.

BRIEF FOR LOUISE H. ADAMS AND FRANK H. ADAMS.

STATEMENT.

(The references to the Transcript are by the original or marginal paging.)

Jay H. Adams, the deceased, on the 13th day of November, 1898, went from Spokane, Washington, his home, to Hope, Idaho, and was returning therefrom in the afternoon of the same day, on a regular passenger train of the Northern Pacific Railway Company. The train left Hope at 4.15 p. m., being three hours and ten minutes behind time. (Train schedule marked Ex. A6, and Trans., orig. p. 312.) The train consisted of a mail car, baggage car, express car, smoking car, first-class day coach, tourist sleeping car, dining car and Pullman

sleeper, placed in the train in the order named. The cars in the train occupied by passengers were vestibuled throughout with the exception of the tourist sleeping car, neither platform of which was vestibuled, nor were the sides of the platforms of the said tourist sleeping car enclosed by means of gates, rods, chains, or any other device, but were entirely open, permitting unobstructed ingress and egress to and from such platforms at the sides. (Trans., orig. pp. 84, 85, 86.) A tourist sleeping car was customarily carried on the through passenger trains (Trans., orig. p. 392) of which the train in question was one, and the platforms of all such tourist cars were open and unguarded, as were those of the car in this train, the company having no tourist sleeping cars with vestibuled platforms. (Trans., orig. pp. 392, 649.) While customarily carrying a tourist sleeper in its trains, with such open and unguarded platforms, the company advertised to the public in three newspapers published in Spokane, all of which were taken and read by the deceased, including the advertisements, that its trains carried a dining car for the use of passengers, and a tourist sleeping car, and were entirely vestibuled throughout. These advertisements had appeared for months prior to the 13th day of November, 1898. (Trans., orig. pp. 271, 272, 273, 280-283, 212, 213.)

The deceased boarded the train at Hope, at the front end, by getting upon either the rear end of the smoking car or the front platform of the adjoining first-class day coach, both of which cars were vestibuled, and proceeded immediately forward in the smoking car, and took his

seat in the front part of it, being accompanied by a friend with whom he was traveling. (Trans., orig. p. 89.) And here it is proper to call attention to a misstatement of fact several times made by petitioner. On page 4 of its brief on the application for the writ of certiorari, and elsewhere, it is said:

"It is an established and uncontradicted fact that "they [referring to the deceased and a friend] got on to "the train by one of the unvestibuled platforms."

Mr. Gabbert, the friend of the deceased, swore positively that he and the deceased got on the train between the day coach and smoking car (Trans., orig. pp. 89, 95), and he remembered that the day coach was vestibuled, and he did not remember as to the smoking car. (Trans., orig. pp. 95, 98.) It is an admitted fact in the case that both smoking car and day coach were vestibuled. (Trans., orig. p., 85.) It is apparent, therefore, that the deceased and Mr. Gabbert, according to Mr. Gabbert's testimony, boarded the train by a vestibuled platform, that it was not admitted to the contrary, and that the above quoted statement is not correct.

Very shortly after the train started, and before any unusual speed had been attained, the deceased left the smoking car to go to the dining car to get some cigars for himself and friend. (Trans., orig. pp. 90, 91.) The deceased did go to the dining car and did purchase cigars, and after doing so left the dining car, in the direction of the smoking car and the friend with whom he was traveling. (Trans., orig. pp. 481, 484, 487, 60, par. 7.)

The dining car conductor saw him leave the dining car, and that was the last time he was seen alive by any person.

Very high speed was commenced about the west end of the Pack River trestle, reaching at the point where the body was found about sixty miles an hour. (Trans., orig. pp. 104-106, 116-121, 126-134, 94, 95.)

The deceased could not be found when the train reached Spokane. Search being instituted, his body was found, on the next day, lying on the rocks opposite a six degree curve in the track about six miles and 2,100 feet west from Hope (Trans., orig. pp. 190, 191), and one mile and 3,480 feet from the west end of the Pack River trestle. (Trans., orig. pp. 191, 192, 142, 145, 149, 150, 187, 188, 175-180.) The plaintiffs are the widow and son of the deceased. (Trans., orig. pp. 205, 209.)

BRIEF.

I.

The Relation of the Statutes of Idaho and Washington and the Contract between Deceased and Petitioner to the Rights of the Plaintiff.

(Assignments of Error 1, 16, 19, Trans., orig. pp. 836, 841, 842, 849.)

The contract on the back of the transportation alleged to have been used by the deceased at the time of his death (Trans., orig. pp. 64, 784), which contract purports to release the petitioner from all liability for injury to the person of the deceased, caused by the negligence of the petitioner, is void as against the plaintiffs:

(1) Because plaintiffs were not parties to such contract, and over *their* right of action for loss to *them*, deceased could exercise no control.

(2) Because the contract does not exempt the carrier from liability for death.

(3) Because the contract is void as against public policy.

(1) THE STATE STATUTES.

The plaintiffs have an independent, separate and distinct right of action for the losses to them occasioned by petitioner's negligence, which right of action the deceased could neither enjoy nor in any wise control.

The negligence of the petitioner, and the death of the deceased therefrom, both occurred in the state of Idaho. The statute of Idaho authorizing this action to be brought is as follows:

"When the death of a person, not being a minor, is "caused by the wrongful act or neglect of another, his "heirs or personal representatives may maintain an ac- "tion for damages against the person causing the death; "or, if such person be employed by another person who "is responsible for his conduct, then also, against such "other person. In every action under this and the pre- "ceding section, such damages may be given as, under "all the circumstances of the case, may be just." *(Revised Statutes of Idaho*, § 4100.)

The statute of Washington, in which state the action was brought, is as follows:

"The widow, or widow and her children, or child or "children, if no widow, of a man killed in a duel shall "have a right of action against the person killing him, "and against the seconds and all aiders and abettors, "When the death of a person is caused by the wrong- "ful act or neglect of another, his heirs or personal "representatives may maintain an action for damages "against the person causing the death, or when the "death of a person is caused by an injury received in "falling through any opening or defective place in any "sidewalk, street, alley, square or wharf, his heirs or "personal representatives may maintain an action for "damages against the person whose duty it was, at the "time of the injury, to have kept in repair such side- "walk or other place. In every such action the jury "may give such damages, pecuniary or exemplary, as, "under all the circumstances of the case, may to them "seem just." (*Ballinger's Annotated Code and Statutes of Washington*, § 4828.)

These two statutes are for the exclusive benefit of the heirs, and are not for the benefit of the estate of the deceased. The statutes of California and Idaho are identical, Idaho having adopted that of California.

Monroe v. Dredging etc. Co., 84 Cal., 515.
Noble v. Seattle, 19 Wash., 133.

It will be noted that, with the exception of four words in the Idaho statute, to-wit: "not being a minor," the language of the two statutes of Idaho and Washington

is identical where authorizing an action for death caused by wrongful act or neglect.

There is one proposition in the interpretation of this character of legislation in support of which there is a vast weight of concurrent authority, and that proposition is that Lord Campbell's act, and the many acts inspired by it in the various states of this country, including the two states of Idaho and Washington, create and grant to other persons than the deceased or his estate, an independent right to recover for the losses sustained by such other persons through the negligence of a party causing death, such right of action being separate and distinct from any right of action which the deceased had, or could have enjoyed had he survived.

The English interpretation of Lord Campbell's act is unmistakably to this effect. In *Blake v. Midland Ry. Co.*, 18 Q. B., 93; 10 Eng. L. & Eq., 443, Mr. Justice COLERIDGE says:

"The title of this act may be some guide to its mean-
"ing, and it is an act for compensating the families of
"persons killed, not for solacing their wounded feelings.
"Reliance was placed upon the first section which states
"in what cases the newly given action may be main-
"tained although death has ensued, the argument be-
"ing, that the party injured, if he had recovered, would
"have been entitled to a solatium and, therefore, so shall
"his representatives, on his death. But it will be evi-
"dent that this act does not transfer this right of action
"to his representative, but gives to the representative a
"totally new right of action on different principles.

"Section 2 enacts that 'In every such action the jury "'may give such damages as they may think propor- "'tionate to the injury resulting from such death, to the "'parties, respectively, for whom, and for whose benefit "'such action shall be brought. The measure of "'damage is not the loss or suffering of the deceased but "'the injury resulting from his death to his family.'"

In *Reed v. Great Northern R. Co.*, L. R., 3 Q. B., 555, there seems to have been some language used which has been pointed to by various courts since as showing a reversal of the interpretation in *Blake v. Midland R. Co.*, *supra*, but the same proposition was squarely held subsequently in *Leggott v. Great Northern R. Co.*, L. R., 1 Q. B. Div., 599; and the same ruling occurs again in *Robinson v. Canadian P. R. Co.*, decided by the house of Lords in 1892. An analysis of the English cases is found in *Brown v. Chicago & Northwestern R. Co.* (Wis.), 44 L. R. A., 579.

In our own country the construction put upon Lord Campbell's act in *Blake v. Midland R. Co.*, *supra*, has been widely followed. In the case of *Chesapeake & Ohio R. Co. v. Dixon*, 179 U. S., 131, this court construed one of these acts, as follows:

"Section 6 of the Kentucky statutes provides: 'when "'the death of a person shall result from an injury in- "'flicted by negligence or wrongful act, then and in "'every such case, damages may be recovered for such "'death from the person or persons, company or com- "'panies, corporation or corporations, their agents or

"'servants, causing the same; and when the act is wilful "'or the negligence is gross, punitive damages may be "'recovered and the action to recover such damages "'shall be prosecuted by the personal representative of "'the deceased.'

"The cause of action thus created is independent of "any right of action deceased may have had, or would "have had if he had survived the injury."

In *Gerling v. Baltimore & O. R. Co*, 151 U. S., 696, the court, considering the act of West Virginia, says:

"The right of action thus given although for the "same act or neglect for which the person injured "would have had a right of action in his lifetime, differs "from an action brought by him, both in the ground on "which it proceeds and in the award of damages. It is "not a common law action to recover damages for the "injuries suffered by him while he lived, but it is an "action given by statute for causing his death."

In *Hurlbert v. City of Topeka*, 34 Fed. Rep., 510, Mr. Justice BREWER, then on the bench of the federal circuit court, discussing the statute of Kansas, in substance similar to Lord Campbell's act, says:

"Section 422 gives a new right of action, one not ex- "isting before; an action which is not founded on sur- "vivorship: an action which takes no account of the "wrong done to the decedent, but one which gives to "the widow or next of kin damages which have been "sustained by reason of the wrongful taking away of

"the life of the decedent. It makes no difference whether "the injured party was killed instantly or lived months; "whether he suffered lingering pain or not; whether "or not he was put to any expense for medical attend- "ance and nursing. None of these matters are to be "considered in an action under 422; and the single "question is, how much has the wrongful taking away "of his life injured his widow or next of kin? It is an "action to recover damages for the death, and in no "sense a survival of an action which accrued to the de- "cedent before his death; whereas, on the other hand, "section 420 provides for the survival of an action which "the decedent himself had in his lifetime."

In *The Oregon*, 73 Fed., 846, construing the Oregon statute, the court adopted this rule and says:

"It is substantially like Lord Campbell's act; and in "the case of *Seward v. Vera Cruz*, *supra*, the view held "was (Lord Blackburn concurring) not that the cause of "action survived, but that 'a totally new action is given "'against the person who would have been responsible "'to the deceased if the deceased had lived; an action "'which, as is pointed out in *Pym v. Rd. Co.*, 4 Best. "'& S., 396, is new in its species, new in its quality, "'new in its principle, in every way new, and which "'can only be brought if there is any person answering "'the description of the widow, parent or child, who "'under such circumstances suffer pecuniary loss by "'the death.'"

In *Munroe v. Dredging etc. Co.*, 84 Cal., 515, the supreme court of that state, in discussing the statute of that state, which is written verbatim as the statute of Idaho, says, after quoting from *Blake v. Midland R. Co.*, *supra* :

"We agree with what is said in the opinion above "quoted that the action given by the statute is a new "action, and not the transfer to the representative of "the right of action which the deceased person would "have had if he had survived the injury."

In *Brown v. Chicago & Northwestern R. Co.* (Wis.), 44 L. R. A., 579, in construing the statute of Wisconsin, similar in substance to Lord Campbell's act, and also the statute of that state of survival of the right of action had by the deceased, the supreme court of that state says:

"The death loss act of the English statute (9 and 10 "Vic. C., 93) commonly called 'Lord Campbell's act,' "and the various laws of a similar kind that have been "modeled after it, give a new cause of action, unknown "to the common law, for the benefit of certain desig- "nated classes of surviving relatives. Such relatives do "not take the cause of action for damages to the de- "ceased by transfer to them by operation of law or "otherwise, but are enabled by statute to recover the "pecuniary loss to themselves caused by the wrongful "taking off of the decedent, the continuation of whose "life would have been beneficial to them. * * * But, "independent of that circumstance, as before observed,

"the language of the two provisions is plain; they re-
"fer to entirely distinct losses, recoverable in different
"rights; the one in the right of the deceased for the
"loss occasioned to him; the other in the right of the
"surviving relatives for the loss to them. * * * * *
"The liability of the wrongdoer * * * is * * * on
"a new right created by the statute—the right of sur-
"viving relatives to compensation for the loss which
"falls upon them."

As will be observed from the opinion of Mr. Justice BREWER in *Hulbert v. City of Topeka*, 34 Fed., 510, his views of the scope and effect of the statute of Kansas compensating loss by death, differed from the opinion of the supreme court of that state, expressed while Mr. Justice BREWER was a member of it, but the latest decision of the judiciary of that state, rendered by its court of appeals, refused to follow the supreme court, and is in accord with the views of Mr. Justice BREWER.

Mo. Pac. Ry. Co. v. Bennett's Estate, 47 Pac., 183.

In *Perkins v. New York Central Rd. Co.*, 24 N. Y., 200, the court, in construing the New York statute based on Lord Campbell's act, says:

"This is a new and original cause of action given by
"and dependent wholly upon the statute. The dam-
"ages recoverable in such case depend upon entirely
"different principles from those recoverable by the per-
"son injured in case death had not ensued from the in-
"jury. In such case the person injured would only

"recover compensatory damages personal to himself, "including expenses incurred and losses sustained in "consequence of the injury. (*Lincoln v. S. & S. Rd.* "*Co.*, 23 Wend., 425.) But in a case where death results "from the injury the pecuniary value of the life of the "person killed to the next of kin is the measure of dam- "ages, to the extent of five thousand dollars. (*Whit-* "*ford v. P. M. R. Co.*, 23 N. Y., 467; *Blake v. Midland* "*Ry. Co.*, 10 Eng. L. & Eq., 443.)"

To the same effect as the foregoing cases, are:

Adams v. N. P. Ry. Co., 95 Fed., 938.

Davis v. St. Louis I. M. & S. Ry. Co. (Ark.), 7 L. R. A., 283.

Jeffersonville R. Co. v. Swain, 26 Ind., 484-486.

Littlewood v. Mayor etc., 89 N. Y., 27.

Western & A. R. Co. v. Bass, 104 Ga., 392; 30 S. E., 874.

Vicksburg & M. R. Co. v. Phillips, 64 Miss., 693; 2 So. R., 537.

Hurst v. Detroit City R. Co., 84 Mich., 539; 48 N. W., 44.

Needham v. Grand Trunk Ry. Co., 38 Vt., 294.

Bowes v. Boston, 155 Mass., 344; 15 L. R. A., 365.

Commonwealth v. Met. Rd. Co., 107 Mass., 236.

Donahue v. Drexler, 82 Ky., 157; 56 Am. Rep., 886.

Fink v. Garman, 40 Pa. St., 95.

The Onoko (C. C. A.), 107 Fed., 984.

Roche v. Imperial Mining Co., 7 Fed., 703.

Re Mayo (S. C.), 54 L. R. A., 665.

It is manifest from the foregoing that the deceased during his life had no interest or right in the right of action granted exclusively to his heirs, which enabled him to release the petitioner from its liability for the loss to the plaintiffs, caused by petitioner's negligence.

There are many cases, however, both English and American, which hold that, unless the deceased had in him unimpaired a right of action, for *his* injuries, at the time of his death, his heirs could not enforce *their* right of action under Lord Campbell's act, and the acts of various states in this country having certain peculiarities in them found in Lord Campbell's act. In some of these cases it has been held that a release by the deceased during life of *his* right of action barred the heirs of *their* right of action.

It is patent that, having an independent right of action for *their* injury and loss under the statutes of Idaho and Washington, there must be found within the statutes creating such independent right of action an affirmative, positive restriction upon, or qualification of, its full enjoyment by the plaintiffs in order to bar them from its prosecution. In *Louisville etc. R. Co. v. Clarke*, 152 U. S., 240, this court, construing a statute giving right of action for death, said:

"The statute imposes no other condition upon the "right to sue. The court has no authority to impose "an additional or different one."

Herein lies the difference between the statutes of Idaho and Washington on the one hand, and Lord

Campbell's act and most of the statutes of the states of the Union relative to death by wrongful act, on the other. In the two former there is no language out of which any condition to or qualification of the right of action in the heirs or widow and children can be construed. In nearly all the latter, and in those under which the courts have held the heirs barred of their right of action because of a release given or judgment gotten by the party injured during his life, is found the same peculiar language found in Lord Campbell's act, which is held to make the prosecution of the independent right of action given the heirs, conditional upon the existence in the deceased of his right of action unimpaired at the time of his death. This peculiar language is entirely absent from the statutes of Idaho and Washington. It is as follows:

"The act, neglect or default is such as would, if death "had not ensued, have entitled the party injured to "maintain an action and recover damages in respect "thereof, then and in every such case, the person who "would have been liable, if death had not ensued, shall "be liable to an action for damages, notwithstanding "the death of the person injured."

Out of this language, or similar language, the courts have held that the act or acts being construed contained a *condition* to the prosecution by the heirs, of the independent and distinct right of action for their loss, and that only when the condition existed could they prosecute their right of action. Thus in *Brown v. Chicago*

& Northwestern R. Co. (Wis.), 44 L. R. A., 589, the court quotes the last expression of the English courts upon the construction of Lord Campbell's act, and adopts the view expressed as its own, as follows:

"The *language* of our statute is that liability of the "wrong doer exists where the deceased could have re- "covered if death had not ensued. * * *

"As I have before said, I am of opinion that the "action being of the same nature, and indeed the same "action in all respects, as that conferred by Lord Camp- "bell's act it must, as an action on that statute is con- "sidered in England, be deemed to be a new action, but "still a new action dependent on the *condition* that the "action of the deceased had not, at the time of his "death, been barred or extinguished."

Again in *Littlewood v. Mayor etc. of New York*, 89 N. Y., 24, which is a leading case in support of the proposition that the party injured may, by releasing the wrong doer from liability for injury to his person, bar his heirs of *their* right of action for the injury to them by his death, the court admits that the heirs have an independent and separate right of action for the losses occasioned to them by the death, and an entirely different right of action from any had by the deceased in his life time, and not a survival of any right had by him. But, while admitting this, the court holds, *because of the peculiarity of the language* heretofore quoted from Lord Campbell's act and found in the New York act, that it is clear that the legislature intended that only in the

event that the party injured had his right of action intact at the time of his death, could the heirs prosecute their right of action.

In another leading case, *Hecht v. O. & M. Ry. Co.* (Ind.), 32 N. E., 302, barring the right to recover for the death, by reason of recovery on his right of action during life by the deceased, the court, construing an act containing substantially the language above quoted from Lord Campbell's act, says:

"For *the act*, as we construe it, *clearly declares* that "the personal representatives of the injured party, when "death ensues, may maintain the action only in case "the injured party might, at the instant of his death "have maintained the action if he had lived. In this "case the injured party at the time of his death could not "have maintained an action for the same act or omission "had he lived; hence there is no right of action given to "his personal representatives by the statute."

And in *Sheriock v. Alling*, 44 Ind., 197, the court says:

"The right of action, which the deceased had at his "death, is not by the law transferred to his representa- "tives, but it gives to them a totally new one on differ- "ent principles * * yet *by the terms of the act*, no action "can be maintained under it, unless the act or omission "causing the death was such that the deceased might, "if alive, maintain an action for an injury caused by "the same act or omission."

The statute of South Carolina is verbatim Lord Campbell's act (*Tiffany, Death by Wrongful Act*, p

329), and *Price v. Richmond & D. R. Co.*, 33 S. C., 556; 12 S. E., 413, is one of the leading cases holding that a release of the railroad from liability for his injuries by the deceased during life bars the widow and children of *their* right of action for the death. The court says:

"But the construction which we have adopted seems "to us the only legitimate one which can be deduced "from the *terms of the statute*, and it has the support "of high authority."

Re Mayo (S. C.), 54 L. R. A., 665.

In the case of *Hill v. Pennsylvania R. Co.*, 178 Pa., 223; 35 L. R. A., 196, a release given the railroad company by the deceased during life, was held to bar suit by the widow for his death. Here again we find potent language in the statute, on which the decision rests, and which is entirely wanting in the Idaho and Washington statutes, and there are other pronounced differences. An action after death is permitted "Whenever death "shall be occasioned by unlawful violence or negligence, "*and no suit for damages be brought by the party in-*"*jured during his or her life*" etc. From this language and other features of the statute peculiar to it, the court construes it to merely to keep alive to certain specified persons the very right had during life by the deceased to recover for *his* injuries; that the widow could not recover under it in her own right for her own injuries; and that the deceased, having full power in life to prosecute this *his* own right of action, had also as "a neces-"sary incident to the right of ownership of the right of

"action," the right to settle it by release. None of the peculiarities of this statute on which the decision rests are to be found in those of Idaho and Washington.

In the case of *Lubrano v. Atlantic Mills*, 19 R. I.....; 34 L. R. A., 797, the court seems to hold that, under the act of Rhode Island containing language similar to that of Lord Campbell's act, where there is also an act providing for the survival of the right of action for the injuries suffered by the deceased, there is not given a separate and independent right of action to the widow and children of the deceased for the losses suffered by *them*, but that there is only a sort of a continuance or a survival of the right of action which the deceased had, and that after his death, notwithstanding the distinct survival statute, an action would not lie on behalf of the estate of the deceased and also on behalf of the widow and children.

This is in conflict with the great weight of authority heretofore cited, but if it were not, the reasoning pursued by the court does not invite reliance upon its conclusion. It says:

"Upon this principle the new remedy must be exclusive *since otherwise there would be two recoveries for the same cause of action* namely, the negligence of the defendant, which is the cause of action on which the deceased would have sued at common law, if he had survived."

In this case the court seems to esteem it a hardship on the wrong doer, from which the legislature *must* have

sought to save him, that the wrongdoer should have to pay damages twice for the same wrongful act, once to the party injured by being hurt physically, and again to another party injured by being deprived of support, maintenance, etc. This reasoning appears in several cases where the scope of the statute is restricted. In this view the damages are treated as a penalty or punishment and it is regarded in these cases as a harsh and unjust measure to punish twice for the same offense. If the sympathetic eye in these cases were not focused exclusively on the corporation, but were permitted to view the person injured and the widow and children, it would be readily seen that the damages recovered are not, except incidentally, in the way of punishment of the corporation but in the way of compensation for their losses.

We are not able to perceive why the corporation should not be liable to two parties, each injured by a single act of negligence, in these cases, with as much propriety as when by a collision from negligence, thirty forty or one hundred different people are injured by the same negligent act. In the latter case a court would hardly suggest that only one of these many injured persons could recover on account of the negligent act which had injured the many, or that a release by such one would preclude the other injured individuals from recovering for their loss through such negligent act. In the case at bar the widow and child are separate and distinct individuals, having separate and distinct capacities from that of the deceased to suffer loss, and through the act of negligence which also injured the deceased,

these plaintiffs have been made to suffer pecuniary loss. There is certainly nothing harsh or inequitable in the statute giving to people, wrongfully deprived of support, education, etc., their own right to recover for themselves the peculiarly personal loss thus sustained exclusively by them. Certainly the proposition is not so inequitable as to induce the court to impose an arbitrary condition to the enjoyment of this right, to support which condition there is no word in the statute.

Missouri Pac. Ry. Co. v. Bennet est. (Kan.), 47 Pac., 183.
Bowes v. Boston 155 Mass., 344; 15 L. R. A., 365.
Needham v. Grand Trunk Ry. Co., 38 Vt., 294.
Hulbert v. City of Topeka, 34 Fed., 510.
Hedrick v. Ilwaco R. & N. Co., 4 Wash., 400.
Brown v. Chi. & Northwestern R. Co. (Wis.), 44 L. R. A., 579, 585.
Louisville etc. R. Co. v. Clarke, 152 U. S., 240.

The court in *Lubrano v. Atlantic Mills*, *supra*, says as a further reason for its conclusion:

"A further consideration in favor of a single action "is the confusion of damages which would result from "the maintenance of two actions. Although they "might be theoretically separate, a practical separation "would be quite impossible. The measure of pain and "suffering, or estimated damage to one's estate cannot "be so definitely marked as to limit liberality of a sym-"pathetic jury."

It does not seem to us that because a jury may be sympathetic, such a fact should weigh in the legislative mind against giving a party injured by the wrongful act of another the right of action for such injury, nor should the sympathy of a jury for one man's pain and suffering preclude the legislature from giving the right of action to a woman and her children for actual financial losses sustained by them from the same wrongful act that caused such pain and suffering to another. We cannot agree with the learned court that it is impossible to prove separately and distinctly the damages sustained by the deceased from injuries to him, and the damages sustained by the widow and child from the distinct losses occasioned to them by the same negligent act, and the New York supreme court agrees with us.

Littlewood v. The Mayor etc. of N. Y., 89 N. Y., 28.

Finally, in this analysis of authorities, we call attention to the case of *Donahue v. Drexler*, 82 Ky., 157; 56 Am. Reps., 886, in which the effect of a release by the deceased during life, under a statute, for the purposes of the question now discussed, identical with those of Idaho and Washington, has been considered.

One Kentucky statute is as follows:

"Section 1. If the life of any person not in the em-
"ployment of a railroad company shall be lost in this
"commonwealth by reason of the negligence or careless-
"ness of the proprietor or proprietors of any railroad,
"or by the unfitness, or negligence or carelessness of
"their servants or agents, the personal representatives

"of the person whose life is so lost can institute suit "and recover damages in the same manner that the "person himself might have done for any injury where "death did not ensue." (*Tiffany, Death by Wrongful Act*, p. 300.)

From its latter part this section has been construed, in *Louisville & N. R. Co. v. McElwain*, 98 Ky., 700; 34 L. R. A., 788, as a survival statute, keeping alive a right of action within the control of the person injured during life. Kentucky has a further statute, as follows:

"Section 6. The widow and minor child or children, "or either or any of them, of a person killed by care- "less, wanton or malicious use of firearms or by any "weapon popularly known as colts, brass knucks or "slung shots, or other deadly weapons, not in self- "defence, may have an action against the person or per- "sons who committed the killing, and all others aiding "or promoting the killing, or any one or more of them, "for reparation of the injury, and in such action the "jury may give vindictive damages." (*Tiffany, Death by Wrongful Act*, p. 300.)

It will be noted that in the section of the Kentucky statute last quoted no condition is imposed upon the right of the widow or children to bring their action; the right is given absolutely, without restriction directly or by implication, and irrespective of any rights whatever, or the exercise of them, which the person assaulted may have had in the premises. It is identical in these re-

spects with the statutes of Washington and Idaho giving the right to recover for death.

In *Donahue v. Drexler*, *supra*, the party assaulted brought an action to recover for personal injury, and the action was thereafter, by written agreement, settled between the plaintiff and defendant. Subsequently the party assaulted died from his injuries, and, under the above statute, the widow brought *her* action for the injuries done to *her* by the death.

In holding that she could bring her action entirely uninfluenced by the settlement by the party injured of *his* right of action, the court said:

"In this case we find two causes of action with dif-
"ferent purposes and reasons for their existence. The
"suit for assault and battery could not have survived to
"the personal representative, for the statute says it shall
"die with the person injured or injuring. It was a per-
"sonal action purely for bodily injury; not for pain, suf-
"fering and loss of service to his wife and children,
"after the injury and before death, and the compensa-
"tion which he had the right to was extinguished by
"his death or the settlement which he made. But his
"right of action for the bodily injury from the assault
"and battery, is wholly distinct from the action which
"the widow and minor children may have for reparation,
"after injury resulting to them from the death. This
"statute creates a new grievance, a new cause of action
"in which neither the deceased nor his estate had any
"interest, and for which his administrator could not sue.

"It is based upon the wrong to the wife and children by "depriving them of their natural support and protection "which the law gives them in the husband and father.

"The injury is to them and their rights. They have "the exclusive right of action under the statute, and are "entitled personally to the results of any judgment, "that may be recovered."

The case of *Bowes v. Boston*, 155 Mass., 344, 15 L. R. A., 365, also construes a statute, for the purposes of this question, identical with that of Idaho and Washington, and if it be borne in mind that it contains no restrictions or condition upon the right given, the conclusion of this case is the same as that of *Donahue v. Drexler, supra.*

See also:

Doyle v. Fitchburg, 162 Mass., 66; 25 L. R. A., 157.

We note the case of *Southern Bell Tel. & Tel. Co. v. Cassin*, 111 Ga., 577, 50 L. R. A., 694. This case is without weight as authority in this court. It is in square conflict with the ruling of this court *(Chesapeake & Ohio R. Co. v. Dixon, supra)* and the mass of authority heretofore considered. It holds that the widow, children or heirs do not have an independent, separate and distinct right of action for the losses to them caused by the death from negligence. On this point also the decision is equally in conflict with a prior decision of the same court, namely, in *Western & A. R.*

Co. v. Bass, 104 Georgia, 392. In the Cassin case the court holds the Georgia statute to be a survival statute, and rests its conclusion that a release by the deceased bars the widow and heirs, on the authority of the many cases, heretofore considered by us, which hold such a release to constitute such a bar; but in all of those cases is to be found the peculiar language in Lord Campbell's act creating, not the survival of the right of action had by the deceased, but a *condition*, only upon which the widow and heirs might prosecute their own independent right of action for their loss. This language is not found in the Georgia statute and, hence, those cases are not authority for the holding of the Georgia court that a release, as a general rule of law, bars the widow and heirs. This is true of the case of *Legg v. Britton*, 64 Vt., 652, which the Georgia court says construes "a statute admittedly like our own." The statute of Vermont is not like that of Georgia, because it contains the peculiar language of Lord Campbell's act creating a condition upon which must be exercised the right of action given to the widow and heirs, and it is on that language that the Vermont court bases its conclusion, for it says: "*The language used* clearly gives the same "right of recovery which would have existed in the "intestate if death had not ensued, and as clearly holds "the wrong doer liable the same as he would have been "if death had not ensued."

The Georgia statute has peculiar language of its own, not found in the Idaho and Washington statutes, which

tends to turn the Georgia statute from a death statute into a survival statute. "In the event of a recovery by "the widow, she shall hold the amount recovered sub- "ject to the law of descents just as if it had been per- "sonal property descending to the widow and children "from the deceased." The Georgia statute does not permit the recovery by the widow or children of *their* actual losses, but provides for the recovery of the "full value of the life."

Further, it is submitted that the reasoning of this case is an argument *ab inconvenienti*, and where that is not resorted to, rests on the Biblical theory of the unity of man and wife, and entirely overlooks the modern legal emancipation of the woman. Finally, the actual language of the statute itself is nowhere discussed in the opinion.

The case of *L. & N. Co. v. McIlwain*, 98 Ky., 700, is cited in the Cassin case as upholding the conclusion reached there, but it aids not at all in construing the statute of Idaho or of Washington. The statute of Kentucky there construed is a survival statute. The personal representative "may institute suit and recover "damages in the same manner that the person himself "might have done for any injury where death did not "ensue"; the proceeds, under the statute, go to the estate.

It has been urged by petitioner that the fact that the action *may* be brought by the "personal representatives" under the statutes of Idaho and Washington, shows *by implication* that the action can only be main-

tained where the deceased could have recovered at the time of his death. In other words, that a statute without the peculiar language of Lord Campbell's act means exactly the same as a statute containing that peculiar language! In other words again, that that language means nothing! We have seen that if the personal representatives bring the action, yet there is an entire absence of any connection between them and any right which the deceased had or could have enjoyed; that no right passes from the deceased to them; that they are merely the agents or trustees of the widow and children for the purpose of bringing the action (*Needham v. Railroad Co.*, 38 Vt., 294); that they bring it in the right of the widow and children, and not in the right of the deceased or his estate; that the proceeds belong to the widow and children and not to the estate; that the action is for injury to the widow and children and not to the deceased; that the *object* of the statute is to compensate *them* for *their* injury; that the injury to them from the negligence remains the same even though the deceased incapacitated himself from suing for *his* injury; that the effect given these words by petitioner is purely arbitrary, and that, as the deceased had no interest in the action whatever, there is no rational implication possible. (*Munroe v. Dredging etc. Co.*, 84 Cal., 515; *Noble v. Seattle*, 19 Wash., 133, and the many authorities heretofore cited.)

The provision relative to "personal representatives" is clearly inserted for the convenience and assistance of the widow, and children, who, by force of the very injury

done them, viz.: the removal of the husband and father, are in need of some one to act for them, and by reason as well as authority it cannot be construed *by implication*, in a remedial statute, so as to destroy the independence of the right of action which rests alone on the independent and separate loss to the widow and children.

Needham v. Grand Trunk Ry. Co., 38 Vt., 292.
Bowes v. Boston, 155 Mass., 344; 15 L. R. A., 365.
Doyle v. Fitchburg, 162 Mass., 66; 25 L. R. A., 157.
Davis v. St. Louis I. M. & S. R. Co. (Ark.), 7 L. R. A., 283.

It is further asserted by the petitioner that the courts below, in ruling that the contract made by the deceased does not bind the plaintiffs, are in conflict with the ruling of the supreme court of the state of Washington in the case of *Muldoon v. Seattle City Railway*, 7 Wash., 528, 10 Wash., 311. A glance at that case, however, immediately discloses the entire absence of any possible conflict between it and the ruling of the courts below in the case at bar. In that case the party who had made the contract with the carrier was not killed, but himself brought the action against the company for the personal injuries inflicted. The question, therefore, of the effect of such agreement where death had been caused and suit instituted by the heirs for their own loss, could not have been, and was not touched upon in that case. Furthermore, inasmuch as the party injured brought

the suit himself, the question whether such an agreement also exempted the carrier from liability for death could not have been, and was not raised or decided. Hence, that case has no bearing whatever on the question here.

(2) INTERPRETATION OF CONTRACT.

The contract offered in evidence and pleaded, only purports to exempt the petitioner from liability for "injury to the person," but it is contended by petitioner that it exempts the corporation from liability for *death* also. The contract follows:

"This ticket is not transferable, and if presented by "any other person than the individual named thereon, "or if any alteration, addition or erasure is made upon "it, is forfeited, and the conductor will take it up and "collect full fare. The person accepting this free ticket "agrees that the Northern Pacific Railway Company "shall not be liable under any circumstances, whether "of negligence by agents or otherwise, for any injury "to the person, or for any loss or damage to the property "of the passenger using the same. I accept the above "conditions. Jay H. Adams.

"This pass will not be honored unless signed in ink by the person for whom issued." (Trans., orig. pp. 64, 784.)

This written contract does not expressly release the carrier from liability for *death* of the passenger. The word death is not used in it, nor is any word which means death, nor is any word used signifying a condition

from which death necessarily follows, or usually follows, or even so frequently follows as that there is any natural or rational implication of death from it. On the contrary, the expression "injury to the person," in its ordinary use, conveys the idea of a condition coexistent with life. In the ordinary use of the expression it implies life instead of death. If one were killed by violence, common usage would not describe the passenger's condition as that of "injury to the person," but as that of *death*, or that he was killed. If not *immediately* killed, common usage would say he had received "injury to his person," but would not stop there, for that would not express the actual condition, but would further say *and* from such injury he died. The condition of death would thus be entirely additional to "injury to the person" within the common acceptance of the meaning of these terms. Any one *intending* by the ordinary use of language to release another from liability for killing him would, therefore, not stop short of expressing the exact condition intended. Certainly, if in any situation in life exact expression is called for, it is where one man is authorizing another in effect to take his life with impunity.

But the law has clearly defined the scope and meaning of these expressions, "injury to the person" and "death." In the law there is the same radical difference that exists in the natural meaning of the two expressions.

In the many cases where statutes have been passed providing for the survival of rights of action for "injury

to the person," no court or legislature has ever held that this expression included and meant "death" *also*, but, on the contrary, to permit an action for death, invariably, notwithstanding a right of action already existed for "injury to the person," an additional act had to be passed providing a right of action for death as for an additional, distinct and different injury; and a right of action for "death" has been steadily held not to include a right of action for "injury to the person." Out of this independence of meaning in the two expressions grow the two statutes which obtain in many states, viz., "survival statutes" and "death statutes." All of the cases under the preceding heading are authority as to the legal meaning of these two expressions, to which we call attention. Out of them the following will very well illustrate the proposition.

Hulbert v. City of Topeka, 34 Fed., 510.
Missouri P. Ry. Co. v. Bennett's Est., 47 Pac. Rep., 183.
Needham v. Grand Trunk Ry. Co., 38 Vt., 292.
Bowes v. Boston, 155 Mass., 344; 15 L. R. A., 157.

The question now discussed is that of the interpretation of a written contract purely, nothing more. And the ordinary rule applies that the intention is to be gotten from the language used. The meaning given the language by common usage, by natural interpretation and by legal interpretation, excludes a release of liability for death. Now where is the equity or extraneous circumstance which will warrant the court in

doing violence to the language and in interpolating into the contract an additional term? When the corporation wrongfully injures a person and he thereafter dies therefrom and the law causes a right of action to survive for "injury to his person," the court allows no extraneous circumstances to weigh in favor of those who own this right of action, even though it be the widow and children, and they be destitute, and even though the death be caused by wanton and reckless disregard of ordinary care. The expression in the law, "injury to the person," is kept within its normal meaning so as to exclude a recovery for the death. As contrasted with the widow's unavailing equity, we have the corporation pleading for the right to be free from liability for wrongfully killing a human being and for wrongfully causing the destitution of the widow. The corporation could not even say that it would receive nothing under the contract if it were not released from liability for "death" in addition to "injury to the person," because, if the contract has any validity, the corporation received in return for transporting the deceased from Hope, Idaho, to Spokane, Washington, immunity from liability for "injury to the person," and the deceased, in consideration of his transportation, relinquished his own right to sue if he survived, and under a survival statute, relinquished the right of his estate to sue for injury to his person if he died. A good consideration is some detriment to the promissee or some benefit to the promissor. This, as a consideration for the contract of carriage, was both. We are content to think that no violence will be done

to the language of this contract in an effort to extend the immunity of a common carrier to negligent killing of passengers carried. Such contracts must be strictly construed.

Hinkle v. Southern Ry. Co. (N. C.), 78 Am. St. Reps., 685.

If it be competent at all for the carrier to stipulate for exemption from liability for his negligence or that of his servants, "it should be required to be done, at "least, in terms that would leave no doubt as to the "meaning of the parties."

Compania De Navigacion La Flecha v. Brauer, 168 U. S., 119, 120.

In view of the fact that the deceased had no interest whatever in the loss that resulted from the death, that it was the exclusive injury, under the statute, of the widow and children, and that thus the right of action was exclusively owned by them, the *inference* is inevitable and strong that the deceased in making a contract did not *intend* to deal with or affect rights to which he was a stranger and owned exclusively by others.

In *Clark v. Geer* (C. C. A.), 86 Fed., 448, where the special contract of the deceased with the carrier provided "that in no case shall the liability of the company exceed the sum of $1,000," and the statute (Kansas) permitted a recovery for death for the widow and children of $10,000, the court, referring to the right of action had by the widow and children and construing the contract of the deceased, said:

"It is a right of action which did not exist at common "law, and, *without the clearest evidence of such a purpose*, "we will not presume that the deceased intended to "make a contract that would alter the rights of his "widow and children or next of kin, as defined by the "statute. It is sufficient to say that the agreement upon "which the defendant companies rely to limit the dam- "ages that may be recovered shows, as we think, that the "deceased was contracting solely with reference to a lia- "bility of the carrier to himself, and not with reference "to the statutory liability of the carrier to others, in case "of his death through the wrongful act, neglect, or de- "fault of the carrier."

In construing the contract, if there be some obscurity in its terms, the moral quality of the two constructions contended for is properly to be considered. If the petitioner was merely contending for the right under the contract to destroy goods with entire impunity, this rule, purely as one of interpretation, might not be applicable. There is nothing immoral *per se*, or *contra bonos mores*, in the destruction of goods by a common carrier, but it is essentially unreasonable and wrong for one person to take the life of another. Though the killing be done by negligence, it does not relieve the act of its essentially evil quality, and nations have recognized this by making negligent killing indictable and punishable. Hence the rule is clearly applicable here, that where there are two interpretations of a contract possible, one of which leads to essentially evil results, and the other is more

consonant with reason and justice, the latter will be adopted.

Coughlan v. Stetson, 19 Fed., 727.
Woodward v. Payne, 16 Cal., 445.
Noonan v. Bradley, 9 Wall., 394.

Since it is not *expressed* in the contract that it released the carrier from liability for *death* from its negligence, if such release is in the contract, it must be found there by *implication* from what *is* expressed. Such implication certainly broadens the exemption of the carrier from liability for its negligence beyond what its exemption would be without such implication. It is true that the liability for negligent killing is statutory, but we do not think the rule upon the carrier derivable from the common law is changed thereby. We think the principle announced by this court in the *New Jersey Steam Nav. Co. v. The Merchants Bank*, 6 How., 383, is applicable:

"The burden of proof lies on the carrier, and nothing "short of an *express* stipulation by parol or in writing "should be permitted to discharge him from duties which "the law has annexed to his employment. The exemp- "tion from these duties should not depend upon impli- "cation or inference, founded on doubtful and conflict- "ing evidence; but should be specific and certain, leav- "ing no room for controversy between the parties."

Mich. Cent. R. R. Co. v. Min. Springs Mfg. Co., 16 Wall., 318.

CONTRACT AS EVIDENCE OF DEGREE OF CARE DUE.

But if the contract could be held to extend to death, nevertheless the ticket and contract as evidence to show the status of the deceased or the degree of care to which he was entitled, that he "assumed the risks," were clearly irrelevant and immaterial. (Trans., orig. pp. 784, 785.)

If the ticket showed that he was carried free, nevertheless the deceased was a passenger and entitled to the same degree of care as other passengers and as if he had paid his fare.

Phila. & R. R. R. Co. v. Derby, 14 How., 485.
Steamship New World v. King, 16 How., 469.
Waterbury v. N. Y. C. & H. R. R. Co., 17 Fed. 67.

This is the duty of a common carrier to one voluntarily and gratuitously carried, and the contract on the back of the pass does not purport to change this duty, but recognizes it and provides that if the carrier violates *this* duty and the deceased suffers injury through such violation of this duty, the damages to which the deceased would be entitled through the failure of the carrier to give him the rightful degree of care need not be paid—"The com-"pany shall not be liable under any circumstances "whether of negligence" etc., that is neglecting its duty.

There is no word in the contract that declares the carrier owes no duty, or that a failure to perform its usual duty or to give the usual care will not be negligence. On the contrary, the contract itself expressly

fixes the status of the party using the ticket as that of a "passenger," and expressly states that, when the carrier has become guilty of "negligence," then it shall not be liable for the injury from such "negligence." The contract contemplates the failure of the carrier to perform a *duty* after it has gone into effect, and contemplates the carrier becoming guilty of *negligence* after it has gone into effect, and notwithstanding the making of the contract. If the "injury" to the "passenger" from such "negligence" were not wrongful it was not necessary for the contract to state that the carrier should not be liable for it. A release from liability for injury resulting from negligence, given *after* the occurrence, would not make the act otherwise than negligent, nor the injury otherwise than a wrong. A release from liability for the wrong *when it shall happen*, clearly has no different effect. It is the consequences of a wrongful act that are being guarded against. Petitioner has heretofore admitted that *some* care is owing notwithstanding the contract; it says it is only the *highest* degree of care which the contract provides the carrier need not give, but petitioner fails utterly to show us how this apportionment of care is to be made. If releasing from liability for the injury consequent on negligence relieves from the duty to take the *high* degree of care, it relieves equally from the duty to take any care whatever; there is no restriction or stopping place indicated in the contract. If the liability for the consequences of its "negligence" be the factor in the contract by which the degree or amount of care owing is to be determined,

then *no* liability would logically indicate *no* care whatever; *some* liability *some* care. If there was *no* care due there could not be the "negligence," which is so clearly recognized and anticipated in the contract.

The petitioner further asserts that deceased was not a *passenger* as the reason why he was not entitled to the *highest* degree of care, and yet the contract itself and both parties to it have fixed his status and relation to the carrier, and declare he *was* a passenger, and the negligence which the contract anticipated the petitioner may become guilty of, is clearly, on the face of the contract, negligence in relation to deceased *as such passenger*.

This contract, further, does not state that the deceased "assumed the risks of traveling," or any of them, and the law of fellow servant is clearly inadmissible here. This contract is in marked contrast with the Voigt contract, where an assumption of the risks is expressly provided for. (176 U. S., 498.) It is further in contrast with the contract in the Voigt case in this, that it *is* provided in the latter that it shall cover death.

(3) THE CONTRACT IS VOID AS AGAINST PUBLIC POLICY.

The contract is void as against public policy. The supreme court of the state of Washington, in *Muldoon v. Seattle & City Ry. Co.*, 7 Wash., 528, 10 Wash., 311, has held that a contract by a party carried free, exempting the carrier from liability "for injury to the person" from negligence, is not void as against public policy or otherwise.

But that case does not decide the question now discussed. It was a suit by the party who signed the contract, for the injury to his person. The contract did not purport to release from liability for negligent killing; death was not in the case, and the validity of such a release, therefore, was not considered or decided.

The liability, however, of a carrier of passengers for negligence is not a question of local or state law, and the ruling of the supreme court of Washington does not control. The question is one of general law, upon which the federal courts will reach a conclusion, independent of the ruling of any state court or courts.

New York Cent. R. Co. v. Lockwood, 17 Wall., 357.
Balt. & Ohio R. Co. v. Baugh, 149 U. S., 370.
Chicago M. & St. P. R. Co. v. Solan, 169 U. S., 136.

The contract offered in evidence (Trans., orig. p. 784) only purports to exempt the corporation from liability for "injury to the person," but it is urged that it exempts the corporation from liability for death also, so that, to consider the question raised understandingly, the contract must be read thus:

"The person accepting this free ticket agrees that "the Northern Pacific Railway Company shall not be "liable under any circumstances, whether of negligence "by agents or otherwise, for * * * killing * * * "the passenger using the same."

In order to determine whether the law, an enlightened public policy, will countenance a contract which tends

to take away the safeguards surrounding the life of a citizen, and will thus enable a corporation to take human life with impunity, there are two interests to be considered.

A man's life is not all his own, nor is he privileged to deal with it exclusively as it pleases him. The state or public has an interest in every citizen's life, which interest is even superior to his own interest, and with that interest the citizen may not deal by contract or otherwise.

In the case at bar a citizen was wrongfully killed. Temerity will not go to the length of saying that he was rightfully killed. By no code of morals, nor by any law, divine or human, can it be said that the corporation was right in killing him. An expressed permission from the deceased to the corporation to kill him by negligence could not have changed the character of the killing. The release from liability necessarily implies a wrongful act; otherwise there would be no liability, and no occasion for the release. The release does not change or purport to change the character of the act. The killing was wrongful.

"This natural life being, as was before observed, the "immediate donation of the great Creator, cannot legally "be disposed of or destroyed by any individual, neither "by the person himself, nor by any other of his fellow "creatures, merely upon their own authority."

Chase's Blackstone's Com. (2d ed.), 72.

Any contract which aids or tends to bring about this condition is essentially evil, and is itself counter to a sound public policy.

Any wrongful act tending to take human life is *malum in se*, and to let it go unchecked or unpunished is to lower the sanctity of human life and the moral tone of the people. No one can view the fact that a life under any circumstances may be wrongfully taken without liability, or punishment, or correction from the law, without having the sanctity of human life lowered in his mind.

Scant regard for human life has ever been a feature of low orders of civilization, and has also characterized most markedly the swift decay of states once commanding among nations. Our civilization has ever heretofore been characterized by the extremest protection of human life.

"Whilst the great commercial and business interests "of the country demand their protection, still the lives "and personal safety of persons are paramount. All "other considerations must yield to this the first and "greatest and most important of all rights for which "governments are organized and laws enacted."

I. C. R. R. Co. v. Hammer, 72 Ill., 350.

This paramount consideration given by the state, and hence by the law, to human life is due, first to a proper reverence for the greatest work of God, and second, to the material interest of the state in the life of the citizen.

Kill the citizen and the plow rusts in the furrow; kill

the citizen and the hum of the factory wheels ceases; kill the citizen and the blast is heard no more in the mine; kill the citizen and learning and intellectual progress come to an end; kill the citizen and the taxes cease to be paid, and the machinery of the state comes to a standstill; kill the citizen and the guns of defense are silent, and the land is open to the invader and to subjugation. The citizen is the state.

Both common and written law have ever recognized this interest had by the state in the lives of its citizens, and in all ways provided safeguards for human life and sought to check, by all means possible, any act or condition tending to take human life or remove any safeguard which tended to make it more secure.

"All laws punishing crimes against the person and "against the public health show that the life and health "of the citizen is a matter of public interest and of the "greatest public consideration. That its citizens consti- "tute the strength and wealth of a state is an element- "ary principle of political economy. It certainly can- "not be said that a man has either a moral or legal "right to speculate with his own life; or to make any "contract tending to remove the safeguards which the "law places around it."

Wells v. N. Y. Central Rd. Co., 24 N. Y., 194 (dissenting opinion).

One cannot bind himself by consenting to relinquish the safeguards with which the law surrounds his life.

Cancemi v. The People, 18 N. Y., 129.

"The state, the public, have an interest in the preservation of the liberties and the lives of the citizens, "and will not allow them to be taken away 'without "due process of law.'" *(Ibid.)*

This case was cited with approval by this court in *Home Insurance Co. v. Morse*, 20 Wallace, 445, wherein was held:

"A man may not barter away his life or his freedom, or his substantial rights."

Doyle v. Continental Ins. Co., 94 U. S., 535.
Warnock v. Davis, 104 U. S., 775.

The state protected its interest in human life by making suicide felony at common law. It was considered an offence both against God and the state, and, to deter further loss to the state from such source, the penalties inflicted were most severe, both upon the dead and upon his estate.

Chase's Blackstone's Com. (2d ed.), 937.

In more modern law the state still protects its interest in human life, and in many of our states statutes are passed with a view to prevent suicide.

Nor was the loss any the less to the state if the death occurred through negligence. Negligent killing was manslaughter at common law and indictable.

Chase's Blackstone's Com. (2d ed.), 940.
1 *East P. C.*, p. 262, § 38.

And in many of our states the state's interest in human life is still safeguarded by making negligent killing manslaughter and imposing penalties therefor.

Keeping these principles in view, let us consider the rules which the state, out of regard for its welfare, and therefore, as a public policy, has imposed on carriers of passengers:

"For the law will, as we have seen, in tenderness to "human life and human limbs, hold the proprietors "liable for the slightest negligence."

Story on Bailments, § 601a.

This obligation does not grow out of contract; the state, the law, public policy, imposes it as a general rule. The state no more in this connection than elsewhere commits the preservation of its interest in the lives of the citizens to private contracts or commercial convenience.

Phila. & Reading R. R. Co. v. Derby, 14 How., 485.

The Steamboat New World v. King, 16 How., 469.

While the books have considered the law of common carriers of goods and common carriers of passengers usually together, it is obvious we think that this case rests on a higher principle than is necessarily involved in the law regulating the carriage of goods. There is nothing immoral *per se* in the destruction of goods by a common carrier, but in all times since the Almighty laid the law upon the world "Thou shalt not

kill," the taking of human life has been a thing evil and pernicious in itself, and to be judged of by rules *sui generis*. To remit the penalty in any case imposed for wrongful killing, on the excuses and reasonings which are relied on to excuse the destruction of goods, drags man from his lofty plane and degrades him to the level of inanimate objects. This subject is above the realm of the law of contracts, and cannot be judged by the rules of commercial convenience.

The E. B. Ward, 16 Fed. Rep., 261.
Cancemi v. The People, 18 N. Y., 128.
Home Ins. Co. v. Morse, 20 Wall., 445.
Doyle v. Continental Ins. Co., 94 U. S., 535.

"The common law has a peculiar regard for human "life; and for this reason exacts a greater degree of "care in respect to it than in relation to any matter of "mere property."

The Cleveland P. & A. R. R. Co. v. Curran, 19 Ohio State, 1; 2 Am. Reps., 365.

The rule governing common carriers and the most important fundamental reason for it are thus stated:

"By the law of this country, as declared by this court, "in the absence of any statute controlling the subject, "any contract by which a common carrier of goods or "passengers undertakes to exempt himself from all re- "sponsibility for loss or damage arising from the negli- "gence of himself or his servants, is void as against pub- "lic policy, as attempting to put off the essential duties

"resting upon every public carrier by virtue of his em-
"ployment, and as tending to defeat the fundamental
"principle on which the law of common carriers was
"established—the securing of the utmost care and dili-
"gence in the performance of their common duties to
"the public."

Chicago M. & St. Paul R. Co. v. Solan, 169 U. S., 135.

"To secure care, diligence and fidelity in discharge of
"his public functions the common law charged the
"common carrier as an insurer; but the rigor of the
"rule has been relaxed so as to allow reasonable limi-
"tation upon responsibility at all events to be imposed
"by contract. We have, however, uniformly held that
"this concession to changed conditions of business can-
"not be extended so far as to permit the carrier to ex-
"empt himself by a contract with the owner of the goods
"from liability for his own negligence."

Inman v. South Carolina R. Co. 129 U. S., 139.

In *N. Y. C. R. Co. v. Lockwood*, 17 Wallace, 357, where human life and human limb were in question, this broad general rule and the reason for it were stringently applied in response to the contention that the carrier, while he could not free himself from liability for his own negligence, might exempt himself from liability for that of his servants. The court says:

"If we advert for a moment to the fundamental prin-
"ciples on which the law of common carriers is founded

"it will be seen that this objection is inadmissible. In "regulating the public establishment of common car- "riers the great object of the law was to secure the "utmost care and diligence in the performance of their "important duties—an object essential to the welfare of "every civilized community. Hence, the common law "rule which charged the common carrier as an insurer. "Why charge him as such? Plainly for the purpose of "raising the most stringent motive for the exercise "of carefulness and fidelity in his trust. In regard to "passengers the highest degree of carefulness and dili- "gence is expressly exacted. * * * * It was for the "reason that the limitations of liability first introduced "by common carriers into their notices and bills of lading "were *just and reasonable* that the court sustained "them. * * * * Conceding, therefore, that special "contracts made by common carriers with their cus- "tomers, limiting their liability, are good and valid so "far as they are just and reasonable; to the extent, for "example, of excusing them for all losses happening by "accident, without any negligence or fraud on their "part; when they asked to go still further and to be "excused for negligence, an excuse so repugnant to the "law of their foundation and to the public good, they "have no longer any plea in justice or reason to sup- "port such a stipulation, but the contrary."

Two of the conclusions reached by the court in the Lockwood case are:

"First.—That the common carrier cannot lawfully "stipulate for exemption from responsibility when such "exemption is not just and reasonable in the eye of the "law.

"Secondly.—That it is not just and reasonable in the "eye of the law for a common carrier to stipulate for "exemption from responsibility for the negligence of "himself or his servants."

The court, having thus laid down general rules, applied them to the facts in the case then being considered:

"Thirdly.—That these rules apply both to carriers of "goods and carriers of passengers for hire with special "force to the latter."

In the *Kensington*, 183 U. S., 268, the rule is again stated thus:

"It is settled in the courts of the United States that "exemptions limiting carriers from responsibility for the "negligence of themselves or their servants are both un-"just and unreasonable, and will be deemed as wanting "in the element of voluntary assent; and, besides, that "such conditions are in conflict with public policy. This "doctrine was announced so long ago and has been so "frequently reiterated that it is elementary."

Now we approach the corner stone, the beginning and the end of the argument in this case in support of this contract.

In the Lockwood case there was a man carried with a ticket, on the back of which was a contract similar to

that in the case at bar, which provided: "That the per-"sons riding free to take charge of the stock, do so at their "own risk of personal injury from whatever cause," etc.

This agreement the court held void as against public policy. But, the petitioner says, in that case the passenger paid for his transportation, and in the case at bar he was carried free. However much ramification of argument may be indulged in, this is the sole and only distinction or difference between the case at bar and the Lockwood case, except that in the latter the passenger was not killed, but remained a virile power in the state. This is the ultimate analysis of the two cases. In the Lockwood case the passenger paid, and the court held that public policy prohibited the carrier from relieving itself from liability for injury to such citizen. How the state could feel that it had a greater interest in the safety of the limbs and life of a citizen who pays for transportation than in the safety of the limbs and life of one who does not pay, but is carried by the corporation, for reasons of its own, free, can not be clearly shown.

It is submitted that this court has already decided the question involved here. It has held in two cases that the *same public policy* which held the carrier to liability in the Lockwood case, holds the carrier equally to the full liability where the passenger is carried free.

In *Phila. & R. R. R. Co. v. Derby*, 14 Howard, 485, the court says:

"When carriers undertake to convey persons by the "powerful but dangerous agency of steam, public policy

"and safety require that they be held to the greatest "possible care and diligence, and whether the consider- "ation for such transportation be pecuniary or other- "wise, the personal safety of the passenger should not "be left to the sport of chance, or the negligence of care- "less agents. Any negligence in such cases may well "deserve the epithet of gross."

In the case of *Steamship New World v. King*, 16 Howard, 469, the court, after quoting the matter just quoted, says:

"We desire to be understood to reaffirm that doctrine "as resting not only on public policy, but on sound "principles of law."

In both of these cases the passenger was carried absolutely free, without consideration of any character whatsoever.

A party cannot relieve himself from a duty imposed by, or waive his objection to an act contrary to, public policy.

Oscanyan v. Arms Co., 103 U. S., 261.
Ray on Contractual Limitations, p. 2.

Public policy prohibited the contract in the Lockwood case. The *same* public policy governs where the passenger is carried free. Free carriage does not alter the public policy. How may the same public policy be violated by a contract in the one case more than in the other? It is submitted that the Lockwood case, the case

of *New World v. King* and the Derby case, taken together, logically and necessarily conclude this question.

In the following cases the exact question at issue here was raised, and it was held that a contract, made with a person carried free, exempting the carrier from liability for injury caused by the carrier's negligence, was void as against public policy:

Vette v. Harmon, 102 Fed. Rep., 17.
Jacobus v. St. Paul & Chi. Ry. Co., 20 Minn., 125; 18 Am. Reps., 360.
R. R. Co. v. Hopkins, 41 Ala., 486; 94 Am. Dec., 607.
Gulf, Col. & S. F. Ry. Co. v. McGown, 65 Tex., 640.
Penn. R. R. Co. v. Butler, 57 Pa. St., 335.
Rose v. Railway Co., 39 Iowa, 246.
R. R. Co. v. Henderson, 51 Pa. St., 315.
Roesner v. Herman, 8 Fed. Rep., 782.
Wharton on Negligence, 589, 592, 641.

Mere injury to the person, a wound, a broken leg, does not necessarily inflict any loss on the state or tend to demoralize the public mind. Recovery occurs and useful citizenship continues. The state *might* fail to show resentment here, but it is inconceivable that the state can assert, under any circumstances, its indifference to the wrongful killing of its citizens, by failing to set hard against it a clear and unyielding public policy.

But, assuming that it is possible that negligence which destroys a citizen's life, robs the state of a part of its power, and robs the widow and children of their main-

tenance, support and education, can be excused,—assuming that the excusing of wrongful killing is not inherently and essentially without and beyond the pale of both justice and reason, where is the reason and justice which can be affirmatively shown to give it support in the case at bar?

The case of *Baltimore & Ohio S. W. R. Y. Co. v. Voigt*, 176 U. S., 498, was urged upon the attention of the courts below as conclusive of the validity of this contract. There is not in that case a single element which gives it any bearing on the case at bar, and it admits of radical distinction. The plaintiff in that case was an express messenger, carried by the railroad to care for express matter, under a contract between the railroad and the express company. While this contract recites that such messenger was carried free, he was in fact carried for hire. The express company paid for his carriage. It was part of the contract, and part of the privileges the express company bought. He was no more carried free because of the recitation in the contract, than was the plaintiff in the Lockwood case, because of the recitation in his contract, or the plaintiff in the case of *Grand Trunk Railway Company v. Stevens*, 95 U. S., 655, because of the recitation in his contract. The carriage of Voigt was on terms identical, so far as concerns a consideration, with those in the Lockwood case and those in the Stevens case. In the Lockwood case, the court says:

"It may be assumed *in limine* that the case was one "of carriage for hire; for though the pass certified that

"the plaintiff was entitled to pass free, yet his passage "was one of the mutual terms of the arrangement for "carrying his cattle."

In the Voigt case, Voigt's "passage was one of the mutual terms of the arrangement for carrying" the express matter. The court did not assume, in reaching its conclusion, that Voigt was carried free, nor state that he was carried free. Hence the effect of the only material difference between the Lockwood and Stevens cases and the case at bar, viz., the effect of free carriage, was not discussed or ruled upon in the Voigt case. A passenger for whose carriage a consideration is paid, under the Lockwood and Stevens cases, cannot be bound by such a contract, and if Voigt was a *passenger*, he was within the rule of those two cases. Hence, it was necessary to make him some other thing than a passenger to avoid that rule, and this the court did, and whether he was carried free or otherwise, did not influence the court in holding that he did not bear the relation of passenger to a common carrier within the rule in the Lockwood case. The court holds that, in effect Voigt was a co-employe with the other employes of the railroad, he holding, in his work and duties and place on the train, substantially that relation to them. The strong analogy between his position and that of a servant injured by the negligence of his fellow-servants, is forcibly depicted, and, upon the theory of the freedom of the master from liability for the injury to one servant by the negligence of co-servants, the railroad was held to have competently

made its contract exempting itself from liability for negligence of its servants. The court's language is very explicit in pointing this analogy, and it lays great stress on language equally clear, of a similar tenor, used in other cases, and particularly in *Bates v. Old Colony R. Co.*, 147 Mass., 255. Leading up to this analogy, the court says:

"His position does not resemble the one in consider-"ation in the Lockwood case and similar cases where "the dispensation from liability for injuries was made "a condition of a transportation which the passenger "had a right to demand and which the railroad com-"panies were under a rightful duty to furnish."

The grounds for this conclusion were, that Voigt was a part of the express company which was in effect being carried, and that the express company was a common carrier, and that it was not the duty and function of a common carrier to carry common carriers, and, hence, in carrying the express company, or its representative on the train acting as the express company, the railroad company was not a common carrier. The court further carefully differentiates Voigt from a passenger, by showing that he was carried not among the passengers, though on a passenger train, but on a car specially constructed for express matter, to handle and care for matter transported, during the period of transportation, doing work similar to that done by employes, and was not carried for the purpose of transporting him from one point to another; in all these particulars bearing a close resem-

blance to an employe, and that thus he was not within the definition of a passenger. These conditions, all absent from the case at bar, most radically distinguish the two. While Voigt, could not compel the carrier to furnish the *kind* of carriage which he enjoyed, the deceased in the case at bar *could* have compelled the furnishing of the kind of carriage *he* enjoyed. Exemption from liability in his case "*was* made a condition of a transpor-"tation which the passenger had a right to demand and "which the railroad companies were under a rightful "duty to furnish." He was carried on a regular passenger train on a passenger car, together with other passengers, having no other object or purpose on the train than to be transported from one point to another on the railroad. He was identical, as regards the transportation he desired and was receiving, with every other passenger on the train. He desired and was receiving the exact character of transportation which the company was organized to supply and which the train was run to furnish, and in carrying him the corporation was performing its usual and customary function, and remained a common carrier.

In the Lockwood case, the court, after saying that a carrier may make a special contract when "he under-"takes to carry *some thing* which it is not *his business* "to carry," says:

"But when a carrier has a regularly established busi-"ness for carrying all or certain articles, and especially "if that carrier be a corporation created for the purpose

"of the carrying trade, and the carriage of the articles "is embraced within the scope of its chartered powers, "it is a common carrier, and a special contract about its "responsibilities does not divest it of the character."

President etc. Bank of Kentucky v. Adams Express Co., 93 U. S., 174.

In the case of *Kinney v. Cent. R. R. Co.*, 32 N. J. L., 407, the court rests its decision upholding the contract upon the very sweeping assumption that, in contracting to carry the plaintiff free, the carrier was not contracting in its character of common carrier. Such reasoning as is indulged in is that the carriage was a "mere benevolence" and therefore not "any part of the business of the carrier." This thought is expressed in another form in *Muldoon v. Seattle City Ry. Co.*, 7 Wash., 528, to-wit, that the carrier was not compellable "to convey him without any compensation whatever." In the Lockwood case the plaintiff could not have compelled the carrier to carry him for less than the regular fare, or upon a freight train at any fare, and the plaintiff in the Stevens case could not have compelled the carrier to carry him on modified terms, yet in both cases the carrier was held liable. A carrier can not relieve himself from his ordinary character by modifying his ordinary terms of carriage.

Woodburn v. Cin. N. O. & S. R. Co. (U. S. C. C.), 42 Am. & Eng. R. R. Cases, 514.

In the Lockwood case, on this point the court said:

"It is argued that a common carrier, by entering into "a special contract with a party for carrying his goods "or person on modified terms, drops his character and "becomes an ordinary bailee for hire, and, therefore, may "make any contract he pleases; that is, he may make "any contract whatever because he is an ordinary "bailee; and he is an ordinary bailee because he has "made the contract. We are unable to see the signifi- "cance of this reasoning. It seems to us more accurate "to say that common carriers are such by virtue of their "occupation, not by virtue of the responsibilities under "which they rest."

And finally in the Voigt case, the court again declares the rule attaching to this character of the common carrier:

"That all attempts of carriers, by general notices or "special contract, to escape from liability for losses to "shippers, or injuries to passengers, resulting from want "of care or faithfulness, cannot be regarded as reason- "able and just, but as contrary to a sound public policy, "and therefore invalid."

The Voigt case is further distinguished from the case at bar by the fact that in it the party who made the contract was not killed but himself brought the suit for the injuries to his person, while in the case at bar the party who made the contract *was* killed.

There is another reason given in the books for prohibiting contracts of exemption, viz., the protection of shippers from duress and consequent unfair bargains through the superior position and vantage had by power-

ful corporations with a monopoly of the carrying facilities. In the Voigt case this reason is stated separate and distinct from the sound public policy which rests, as we have seen, on "the fundamental principle on which the "law of common carriers was established—the securing "of the utmost care and diligence in the performance "of their common duties to the public."

This is particularly true in regard to carriers of passengers. Life and limb are dearer to the state than entire freedom of the citizens from hard bargains.

In the Lockwood case, after laying down the "*funda-*"*mental* principles on which the law of common carriers "is founded," viz., "to secure the utmost care and diligence in the performance of their important duties," and "in regard to passengers the highest degree of carefulness and diligence is expressly exacted," the court discusses the inequality existing between the carrier and the public, and, in regard to it, says:

"These circumstances furnish an *additional* argu-"ment, if any were needed, to show that the conditions "imposed by common carriers ought not to be adverse "(to say the least) to the dictates of *public policy* and "*morality*."

And, finally, on this point, there were no possible circumstances of duress in the case of *Grand Trunk Ry. v. Stevens*, 95 U. S., 655. There the passenger had full freedom to pay ordinary fare and ride on an ordinary ticket. He elected not to do so, but his contract of exemption was held void nevertheless.

It is urged that the party injured by the negligence, himself consented to the exemption by the carrier, and that to prohibit the contract between them is a harsh and improper restriction upon the freedom of the parties to contract, which the law should foster and encourage rather than restrict.

The party injured consented to the exemption from liability also in the Lockwood case, and if the right to contract cannot be infringed, it would have been a good defence also in the Lockwood case, and in every other case where contracts have been held void as against public policy.

In *Grand Trunk Ry. Co. v. Stevens*, 95 U. S., 655, the court, having held that there was a consideration for the pass in that case, used the following most significant language:

"We do not mean to imply, however, that we should "have come to a different conclusion, had the plaintiff "been a free passenger instead of a passenger for hire. "We are aware that respectable tribunals have asserted "the right to stipulate for exemption in such a case; "and it is often asked, with apparent confidence, may "not men make their own contracts, or, in other words "'may not a man do what he will with his own?' The "question at first sight seems a simple one. But there "is a question lying behind that: Can a man call that "absolutely his own, which he holds as a great public "trust, by the public grant, and for the public use; as "well as his own profit? The business of the common

"carrier, in this country at least, is emphatically a "branch of the public service."

This question has been answered in many cases, additional to the Lockwood case, imposing restraint on the right to contract.

Home Ins. Co. v. Morse, 20 Wall., 445.
Oscanyan v. W. R. Arms Co., 103 U. S., 261.
Warnock v. Davis, 104 U. S., 775.
Doyle v. Continental Ins. Co., 94 U. S., 535.
Cancemi v. The People, 18 New York, 128.
Munn v. People of Illinois, 94 U. S., 113.
United States v. Joint Traffic Ass'n, 171 U. S., 505.

It is urged in the New York cases (*Wells v. New York Central R. Co.*, 24 N. Y., 181) and in several cases in other states, that:

"It cannot reasonably be said that because five or ten "persons on a train that carries two hundred have such "passes, there is the less inducement to care on the "part of the company or its agents, or that a feeling of "indifference to human life would be thereby caused, "the quantum of interest, the ratio of motive is too "utterly insignificant when compared with the liability "not protected by any contract binding the company "and its agents to every measure of caution."

But the whole "two hundred," everyone on the train, might hold such pass, as was substantially the fact in *Rose v. Des Moines Val. Ry. Co.*, 39 Iowa, 246, the train carrying excursionists, a soldiers' reunion, all the excursionists being supplied with such passes. If all the

train could not enforce the liability, it would certainly tend to make the officials take chances with the train, use old or defective rolling stock, being crowded by such an unusual demand upon their resources, or otherwise suit the convenience of the road as their prime object, instead of exclusively consulting the safety of the passengers. The absence of the stimulating effect of the general rule would, in such case, tend to remove the safeguards about the lives of several hundred citizens, put them in jeopardy, and might tend to the destruction and maiming of many.

Never ceasing vigilance by the carrier is the only security for the passenger. It is, therefore, public policy and the interest of the state to insure this by the only means possible, namely, sharp punishment in the way of liability in case of default. The public at large are entitled, for their safety, to have the liability always unimpaired, to the end that no negligence may go unpunished, and that each punishment may freshen in the carrier the sense of liability and quicken his care and diligence. It might well be that a condition of flagrant negligence existed in the operation of a train and that, through that negligence, one person should be injured or killed, and he be carried free on a contract exempting the carrier. If the carrier be exempted from liability for this negligence and the state's regard is only for the lives and safety of those who pay, these favored ones might also fall victims to this exemption from liability. In such a case the carrier might not consider the condition which caused the death negligence, or,

escaping with impunity, after killing one man, he might not deem it necessary to make a correction, for impunity begets carelessness, and the negligent condition might continue until, because of it, on a subsequent occasion, paying passengers, and many, might be maimed and destroyed; while, if punishment in the shape of liability and heavy damages had followed quick upon the discovery of the negligence in operation in the first instance, the carrier would have been instructed to the effect that the condition *was* negligence, or that he would suffer loss again through its continuance, and would have made a correction of it.

The duty owing by the carrier is a public duty; it does not grow out of private contract with each individual carried, but is imposed for the welfare of the public.

> *Grand Trunk Ry. v. Stevens*, 95 U. S., 655.
> *Chicago M. & St. P. R. Co. v. Solan*, 169 U. S., 135.
> *Munn v. People of Illinois*, 94 U. S., 113.

The imposition of a duty would be a farce were there no penalty to enforce its performance. Hence one of the chief purposes of the infliction of damages in each case of default is to secure the public welfare by enforcing the performance by the carrier of its public duty to take care.

While holding the contract illegal might not *per se* tend to reduce negligence and injury, the infliction of the penalty in the way of damages in each particular case undoubtedly would so tend, and undoubtedly has

had great influence on the present condition of travel. Each punishment quickens and keeps fresh the fear of loss, and, consequently, keeps active the care.

That the state is interested directly even where a single individual is negligently killed, though he ride free, and has exempted the carrier from liability, is further manifest in this: that when the bread winner is taken away, those are left who are usually incapable of self-maintenance, the widow and children, or the aged parents. The duty immediately devolves upon the state to care for them, in the event that they are left without resources. It is the state's interest, therefore, both in order to protect itself from financial burdens, and also to preserve in its citizens a free spirit, that the rightful independence of this little community should be preserved.

In the *E. B. Ward*, 16 Fed., 259, the learned court, in discussing the reason why, at the common law, there was no action for death, says:

"But I think while the ground for the determination "was in part both these, the principal ground was that "the life of a subject was, so far as it could be capable of "proprietorship, the property of the government; that the "justice which was to be satisfied, was, therefore, public "justice; that the deceased person and his family were "valued by the law only as members of the state; that "the public, through the government, inflicted punish-"ment and received the amercement, and, so far as ne-"cessity existed, provided for the family, and, therefore, "private redress or satisfaction was excluded."

The court then speaks of the actions provided by Lord Campbell's act in the various states, and says:

"They permit such an action to be brought only "in favor of those who would naturally be dependent "upon the person slain, and after his death upon the "state, and the effect of the action is pro tanto to relieve "the state of a public charge."

II.

Sufficiency of the Evidence.

(Assignments of Error 17, 18, 23, 24, Trans., orig. pp. 842, 845, 846.)

It was contended in the trial court, in support of petitioner's motion for a new trial (Trans., orig. pp. 76-78), that the evidence in this case was insufficient to support the verdict in two particulars:

First.—That there was not sufficient evidence of negligence on the part of the defendant.

Second.—That there was not sufficient evidence to show that the negligence of the defendant, if any there was, caused the death of the husband and father of the plaintiffs.

The court below, after listening to the extended argument of counsel for the defendant on these points, was in no doubt as to the sufficiency of the evidence in both particulars, and denied the motion. We presume, however, that these points will be urged in this court in support of defendant's request below for a peremptory instruction, and, therefore, we consider them.

NEGLIGENCE OF THE DEFENDANT.

It has been asserted by petitioner that the only negligence charged in the case was high speed and the absence of the vestibule appliance, and that the court erred in allowing the absence of the vestibule to be considered by the jury, and that it can not be known on which ground the jury rested its verdict. There were many elements of negligence shown, as follows:

(a) In a train carrying a diner for use at all times, a car with platforms unclosed at the sides by gates, rods, chains, vestibule appliance, or other device. (Trans., orig. pp. 84-87, 386, 763, 764, 766, 768.)

(b) The placing of this car in the *middle* of the train instead of at either end, thus compelling passengers to pass over the unguarded platforms in using the diner. (Trans., orig. pp. 84-87, 386, 763, 764, 766, 768.)

(c) High speed under these circumstances. *(Infra*, pp.

(d) High speed around a sharp curve. *(Ibid.)*

(e) The failure to use the air brake at the sharp curve. *(Infra*, p.

The absence of the vestibule could not be considered as the negligence in the case, standing separate and alone as an isolated fact, nor was it so presented to the jury. It was presented by the court's charge to the jury in connection with the carrying of the diner, in connection with the placing of the unvestibuled car in the middle of the train,—"under the circumstances"—and

in connection with the absence of "railings, rods, chains or gates to enclose the platforms."

The ultimate question presented to the jury in connection with the car, distinguished from its fellows as the "unvestibuled car," was whether it was negligence to have a car in the train with *open* platforms—"your judgment is appealed to to say whether it was negligence or not upon the part of the defendant company to have that unvestibuled car in that train, *without railings, rods, chains or gates to enclose the platforms.*" (Instructions Nos. 22 and 20, Trans., orig. pp. 808, 807.)

But, in any event, the absence of the vestibule and other devices to close the sides of the platforms was pleaded as an element of negligence (Trans., orig. pp. 16, 17), and the evidence of it was introduced in support of the pleading with the consent of petitioner and without any objection. (Trans., orig. pp. 84, 87, 763, 766, 767, 769, 155-157.)

In the written stipulation putting this matter in evidence, petitioner reserved the right to object at the trial as it should be advised, but evidently considered the matter proper for the jury's consideration in support of the pleading and made no objection to its introduction, and subsequently put the absence of the vestibule in evidence by its own witnesses. (Trans., orig. pp. 763, 766, 767, 769.) At that time the petitioner must have thought this evidence favorable to it, or it would not have made the stipulation and allowed it and the other evidence to go to the jury, if for any reason the evidence be incompetent. Petitioner thus consented that the par-

ticular matter of the unvestibuled platforms should be submitted to the jury. It is entirely too late, when its case has turned out badly, for petitioner to complain of the trial court allowing the jury to consider the evidence which petitioner itself had thus consented might be given them for their consideration, and which petitioner never asked to have withdrawn.

1 *Thompson on Trials*, § 700.
Belk v. Meagher, 104 U. S., 279.
Roberts v. Graham, 6 Wall., 578.
Boston & A. R. Co. v. O'Reilly, 158 U. S., 334.
Patrick v. Graham, 132 U. S., 627.

The peremptory instruction asked by petitioner (Trans., orig. p. 799), on which it must rely, is a general demurrer to the whole evidence, not to any part. There is other evidence of negligence in the record besides the absence of a vestibule device, viz., evidence as to the platforms without *any* device to close them at the sides in connection with the diner carried for use at all times; high speed at the sharp curve; the placing the car with platforms uninclosed in the middle of the train, compelling passengers to pass over them to reach the diner, and the failure of the engineer to use the air-brake to steady the cars at the sharp curve, being charged with knowledge that passengers might be in the act, while accepting the carrier's invitation to the diner, of crossing the open platforms. If in the whole record there is *any* evidence tending to show any act of negligence by petitioner, the verdict cannot be overthrown on the

ground that petitioner let in some evidence to the jury that does not show negligence.

Parks v. Ross, 11 How., 373.

If the petitioner, after admitting the evidence without objection, had desired to prevent the jury from finding negligence solely because of the failure to have the vestibule appliance on the tourist car, it should at least have asked for an instruction separating this particular matter from the absence of rods, gates, chains, etc., the carrying of the diner, etc., and directing the jury that on the failure to have the vestibule appliance, *alone*, they could not find negligence. Such instruction not being requested, the failure to give it was not error.

Carter v. Carusi, 112 U. S., 478.
Express Co. v. Kountze, 8 Wall., 342.
Pennock v. Dialogue, 2 Pet., 15.

DUTY TO ADOPT SAFETY ADDING APPLIANCES.

It had been long the custom of the defendant to carry on its through trains, for the use and convenience of passengers, a dining car where meals were served, and where also cigars and liquors were served to those wishing them. (Trans., orig. pp. 479, 481, 58, par. 4.) This car was advertised as being carried on these trains for the use of passengers. (Trans., orig. pp. 271-273, 280-283.) The conveniences of the dining car were extended to the passengers at all hours, whether at meal-time or otherwise, and whether the train was in motion

or otherwise, sales being made to them at all times except late in the evening when the train crew needed the car for sleep, and the passengers commonly and customarily used this car at all hours, going to and from it without restriction or interference of any kind whatsoever. (Trans., orig. pp. 155, 275, 276, 277, 278, 182, 183, 290, 291.)

The deceased was acting upon the invitation of the defendant, held out to its passengers by prolonged custom and practice, and by its advertisements, and using the dining car for the very purpose for which it was carried, and in the appropriate and long established manner.

At a time when, in the development of railway carriage, there was no dining car carried on the train, and the train stopped at eating stations, and passengers were not invited or expected to pass from car to car, but, on the contrary, were warned to keep off the platforms, the cars then used, the platforms being left open at the sides, were sufficiently safe in connection with the method of travel then in vogue.

When the carrier, however, in keeping up with modern progress, adopted a different or changed method or system of transportation, it became obligatory upon him to make the additional means adopted by him to carry on the changed system or method such that they could be used with safety by the passengers for whose use they were employed. Having adopted the method of feeding the passengers upon the train, and having adopted and put in use a dining car for that purpose, and having

arranged for the passengers in all the other cars to pass to and from it, in order to use it, at all hours whether the train was moving or otherwise, it became the unquestionable duty of the carrier to make such use of it by the passengers safe. It undertook to carry them while in the passenger car, on the platforms going to the dining car, and in the dining car. Its duty was to carry them, *wherever* it undertook to carry them, safely. To put it differently, the carrier, after the adoption of the dining car system, carried its passengers on a train in contradistinction to carrying them, as theretofore, on a car. When passengers were riding, therefore, on the train, in the manner provided for by the carrier, it became the duty of the carrier to make the train safe for the purposes to which he devoted it.

The dining car was carried in front of the Pullman sleeper, behind all the other cars on the train. The tourist sleeping car was immediately in front of it. (Trans., orig. pp. 386, 84-87.) All of the passengers on the cars in front of the diner, were compelled, in reaching it, to pass over one or both of the open platforms of the tourist sleeping car. It is patent to a very low order of understanding that these platforms, over which passengers passed while the train was in motion, to reach the dining car, would be much safer if enclosed at the sides than when open at the sides. There were in known practical use several devices by which the platforms could have been closed at the sides, viz., the vestibuling device, iron gates (Trans., orig. pp. 589, 243-251), chains, rods etc. For adults with normal strength and self-control, the

latter three appliances would have aided greatly to prevent them being thrown from the platforms, though insufficient for the full protection of feeble people, those suddenly sick, or for children. The vestibule appliance gave certain and absolute protection to *all* in crossing the platforms. The vestibuling device makes the train, so far as communication with the outer world is concerned, one car from end to end, and renders impossible falling therefrom. Disputing that very great additional safety lies in the vestibuling device to passengers passing to and from the dining car, is not compatible with reason, and even defendant's witnesses were compelled, by force of persistent cross-examination, to admit it. (Trans., orig. pp. 156, 157, 84-87, 657, 535, 536, 547, 571, 572, 588, 589, 602, 617, 624, 625, 639, 643, 644.)

This vestibuling device had been in known practical use upon railway passenger cars and trains for certainly six or seven years prior to the 13th day of November, 1898 (Trans., orig. pp. 156, 528, 544, 554, 555, 581, 584, 598, 608, 609, 59, par 5), and was in known practical use at that time, and was in use and operation on this very train on all the passenger cars with the exeeption of the tourist sleeping car. (Trans., orig. pp. 84-87.) Its common and established use and steady and continuous adoption, and its patent effect in protecting the passenger in passing from car to car had, at the date of this disaster, long taken it out of the realm of uncertainty and speculation as a safety-adding device to passenger travel.

The railway passenger carrier is bound to use on its

cars the best appliances in known practical use that increase the security of the passengers; and it is bound to adopt the best means or appliances in known practical use which increase the safety of the passenger, in view of the method or system of transportation employed by it—that is, in the case at bar, the appliances giving the most safety in using the dining car.

N. J. R. R. & Trans. Co. v. Pollard, 22 Wall., 341.
Pa. Co. v. Roy, 102 U. S., 451.
Treadwell v. Whittier, 80 Cal., 592-593.
Caldwell v. N. J. Steamboat Co., 47 N. Y., 282.
Meier v. Pa. R. Co., 64 Pa. St., 225.
Hegemen v. West R. Corp., 13 N. Y., 9.

It is not possible to question the application of this rule in the case at bar. The rule might be evaded possibly in other cases by showing that the appliance did not add to the safety of the passenger, or by showing that, by the exercise of the greatest diligence, it was a physical impossibility for the carrier to have adopted the appliance. Neither excuse exists in the case at bar. The additional safety from the appliance is admitted by all. The fact that the deceased would have been alive to-day had it been in operation, cannot be questioned, and Mr. Gilbert, the superintendent of the defendant company at Spokane, himself admitted the additional safety of the vestibule (Trans., orig. p. 657), and his testimony clearly shows that the *convenience* of the defendant was the only reason why it had not been put upon the tourist sleeping cars. (Trans., orig. pp. 653-657.) No excuse

whatever was offered for not enclosing the platforms at the sides with a device of *some* kind. Substantially the only defense on this point attempted was that other roads in the country were guilty of the same negligence. (Trans., orig. pp., 522-644.)

ABSENCE OF ANY GUARD TO SIDES OF PLATFORMS OF TOURIST CAR, AND THE POSITION OF THE CAR IN THE TRAIN.

But, irrespective of this time-honored rule requiring the adoption of safety adding appliances, the action of the defendant in sandwiching the tourist sleeping car, with platforms entirely open at the sides, in the train so as to compel passengers of necessity to pass over its open platforms in going to and from the dining car, is glaring negligence. (Trans., orig. pp. 84-87, 386, 762-771.) All kinds of people used the dining car, children, old people and women. The record shows it was no unusual thing to go around six degree curves at fifty miles an hour. (Trans., orig. pp. 355, 361.) It further shows that when the flanges of the wheels of the car strike the side of the rail at the beginning of a curve there is a jar or jolt, and that the greater the speed the greater the jar or jolt of the car (Trans., orig. pp. 660-663, 105, 118, 119, 131, 426), and the tendency of the human body to swing outward from the train toward the convexity of the curve as the train rounds it is common knowledge.

We have here a narrow bridge from car to car, not stationary, but oscillating, and more or less unsteady

and uncertain to the foot, particularly as cars strike the beginning of curves. If this narrow bridge were stationary over a chasm in the earth, and a fall from it would mean death or serious injury upon the rocks below, to leave it unrailed or unguarded on both sides, all conditions of people having to pass over it, immediately strikes the mind as negligence showing a reckless indifference to human life and limb; but in the case of this unsteady bridge, entirely open at the sides, to which there is communicated from time to time a sudden jar or jolt, by the wheels hitting the curve, and upon which the equilibrium of the passenger is further overthrown outward from the convexity of the curve, any one, railroad man or otherwise, sees, and must see clearly, the likelihood of one passing at such a time falling and being mangled or killed. The lowest order of foresight and diligence for the care and safety of the passenger would foresee and guard against this danger.

The rectifying of this dangerous condition would have been a matter of extreme simplicity, with insignificant expense of time, labor or money. An iron chain, of the value of a few cents, attached to the end of the body of the car and stretched across the side of the platform to the railing at the end of the platform, would have saved this life. A wooden rail, which the average man could make with a jack knife and, with a hinge, two screws, a hook and a screw driver, attach to the end of the body of the car and let down across the side of the platform to the iron rail at the end of the platform, would have saved this life. A farmer sees a broken place in his

fence and knows that his stock may get through into his neighbor's turnips, and knows that he will be guilty of negligence if he allows it to go unrectified, and he takes a piece of fence rail, or old board, and fills the hole. The care and the means resorted to by the farmer to avoid negligence on his part, and to save his neighbor's turnips, if resorted to to fill the hole in the side of this train, would have saved this life. Any of these simple means could have been applied within fifteen minutes at any station at which the train stopped after leaving St. Paul, or could have been applied while the train was in motion.

The record discloses that there are in known practical use, to enclose platforms of passenger cars, light iron gates, open work, and in the nature of things, cheap, which are secured on to the end of the car, and very little expense, and very little time and insignificant labor would have applied these gates to that tourist car, and this life would have been saved. (Trans., orig. pp. 589, 243-251.)

The tourist sleeping car could readily have been carried at the rear of the train, or in front of all the other passenger cars (Trans., orig. pp. 531, 532, 554, 249), and thus the passengers in all the other cars on this train would have been able to pass to the dining car without passing over the open platforms of the tourist car, and if this had been done the deceased would not have been killed. It is true that those in the tourist sleeping car would still have been exposed to danger if they went to the dining car, but comparatively few of

them used the dining car, the tourist sleeping car being fitted with a cooking range, and arranged so that those thus carried can feed themselves in that car (Trans., orig. p. 432); and in any event they would have but one open platform to cross, while with the tourist car in the middle of the train, all passengers in front of it would have to cross two.

In view of these facts, the petitioner's contention that, while having arranged for passengers to pass to and fro over these platforms, and while knowing that they were so passing, it was no negligence on its part not to resort to any of the simple means that would have made the way to and from the dining car safe, is utterly untenable.

Choctaw O. & G. R. Co. v. McDade, ... U. S., ..., decided Nov. 2, 1903.

HIGH AND DANGEROUS SPEED.

The train was three hours and ten minutes late leaving Hope. (Train schedule, Ex. A6, and Trans., orig. p. 312.) The usual or schedule time for this train from Hope to Spokane was two hours and twenty-five minutes. (Train schedule, Ex. A6, Trans., orig. pp. 258-9.) The actual time consumed by it on the afternoon in question was one hour and fifty-five minutes, thirty minutes of the delay being made up in running the eighty-five miles and a fraction between Hope and Spokane. It left Hope at 4.15 P. M. and reached Spokane at 6.10 P. M. (Trans., orig. pp. 312, 323.) The distance between Hope and Sand Point, going west, is sixteen miles. (Trans., orig. p.

301.) The ordinary or schedule time for running this sixteen miles was thirty-five minutes. (Train schedule, Ex. A6.) This distance was run on the afternoon in question in twenty-four minutes (Trans., orig. pp. 321, 322, 516, Train sheet, defendant's Ex. 2), or at an *average* of forty miles an hour from the instant of starting to the instant of stopping. Thus eleven minutes of the thirty minutes made up in the eighty-five mile run were made up in this first sixteen miles. The speed was moderate out through the yards at Hope, and down to the east end of the Pack River trestle, a distance of about four miles. (Trans., orig. pp. 104, 105, 116.) The train went at moderate speed over the trestle, 7,100 feet long (Trans., orig. p. 300), until toward the western end. (Trans., orig. pp. 315, 116, 104, 105.) There is an upgrade about two miles long just west of Oden, a station about midway between Hope and Sand Point. (Trans., orig. pp. 303, 304.) The track from the west end of the Pack River trestle to Oden, which includes the point where the body was found, is substantially a dead level and was in perfect condition. (Trans., orig. pp. 303, 304, 305, 730, 715, 716, 328.) The engine in use was capable of running one hundred miles an hour and had drawn a train at a speed of ninety-three miles an hour. (Trans., orig. pp. 343, 344.) The engineer had, on previous occasions, driven his train over that piece of track and around the very curve where the deceased was thrown off, by his own admission, as many as three hundred times at fifty to fifty-five miles an hour. (Trans., orig. pp. 355, 361, 328.) He had often run

from Hope to Sand Point in less time than on this occasion, and had once driven a passenger train between these points at an average of nearly sixty miles an hour from the instant of starting. (Trans., orig. pp. 347, 348.) The reason attempted to be shown to support his statement that on this particular occasion he was going, at the identical point where deceased was thrown off, at not over thirty-five miles an hour was that this dead level track had curves in it. (Trans. orig. pp. 310, 311, 112.) From the top of the hill beyond Oden he increased his speed rapidly, by his own admission, on a down grade, over track containing curves, from forty-three or forty-five miles on up to sixty between there and Sand Point. (Trans., orig. pp. 340-343, 303, 304, 299-301, map marked defendant's Ex. A3.)

Following these most significant facts, the government railway mail clerk, who had at the time of this disaster been in the government railway mail service for nearly three years, and at the time of the disaster had been running on the through train between Hope and Spokane for about eight months, and who was on the train in question, still in the government service and in the mail car, testified that high speed began about the west end of the Pack River trestle, and that, as the train left the Pack River trestle, it was going at the rate of fifty miles an hour, and that the speed was rapidly increased from that point until by the time it had gone a mile and a half west of the Pack River station the speed had reached sixty miles an hour. (Trans., orig. pp. 117, 118.) And he says further re-

garding the speed over this piece of track from which the deceased was thrown: "I never rode, before nor since, anything like that fast." (Trans., orig. p. 120.) He further states that, from the excessive speed, the car in which he rode so lurched and oscillated at the curves that he was unable to perform his ordinary work, and was compelled to hold on to the car to keep from being thrown from side to side. (Trans., orig. pp. 118-120.) He further says that in the run over this piece of track the car swung so violently that the mail bags piled on either side fell to the floor of the car. (Trans., orig. p. 119.) This witness is a man of long experience on fast trains, holding a position of trust under the government, and we call attention to the whole of his testimony. (Trans., orig. pp. 112-127.)

The witness Wickersham was in the employ of the Northern News Company, selling its goods on the Northern Pacific Railway, running between Helena and Spokane, and was on the train in question. (Trans., orig. p. 127.) Just after the train left Hope he was warned by the brakeman that the train was going to make an unusually fast run from Hope to Spokane, and that it would not be safe for him to go from car to car, and instead of proceeding with his business, on account of this warning, he sat down in the smoking car. (Trans., orig. pp. 128, 129, 139, 140.) That within a mile west of the trestle he served a passenger in the smoking car with fruit, and the shaking of the car going about the curves was so great as to make him sick. He had a long experience in riding on these trains, making ten

trips a month from Helena to Spokane, and had been in the employ of the Northern News Company for over two years. (Trans., orig. pp. 130, 131.) This witness further states that at the time he was serving the passenger in the smoking car, and was made sick, the train was running fifty-five or sixty miles an hour, and that over this piece of track from the trestle west to Oden it was usual, when the trains were late, to run fast in making up time, because the road there was smooth and level, an exceptionally good piece of road (Trans., orig. pp. 132, 133), but that this trip over that part of the road on the 13th day of November, 1898, was the fastest he had ever made there. (Trans., orig. p. 133.) Owing to the speed and the motion of the train over curves, this witness, whose custom it was to go through the train after leaving Hope (Trans., orig. p. 128), did not leave the smoking car between Hope and Sand Point. (Trans., orig. p. 134.)

Mr. Jeannot, a merchant of Hope, Idaho, was on this train in the smoking car, and during the eight years of his residence in Hope had traveled to and from Spokane, over the Northern Pacific road, twice a month. (Trans., orig. pp. 99, 100.) He noticed the increase of speed within half a mile after the train left the west end of the Pack River trestle, and states that within a mile west of the trestle the train was going, in his opinion, sixty miles an hour. (Trans., orig. pp. 104-106.)

Mr. Gabbert, a mining man, who had traveled considerably over the Northern Pacific line, testified that he was thrown against the end of the seat in which he sat by the swinging and lurching of the car, and that the

speed was fast a short time after the deceased left the smoking car to go to the dining car. (Trans., orig. pp. 93-95.)

If the positive testimony of these four disinterested witnesses, as to the high rate of speed at which the train was running and the extreme commotion in the train which this high speed produced along the track between the Pack River trestle and Oden, and at the point where the deceased was thrown from the train, be considered, together with the foregoing additional significant facts, it will be at once seen that the jury had ample evidence upon which to find that the train, at the point where the deceased was thrown off, was running at a very high and unusual rate of speed.

Whether a given rate of speed is negligence depends on the conditions under which it is maintained.

The defendant was running in the middle of its train, a car with open, unguarded platforms, with a standing invitation to the passengers to go over those open platforms at will to the dining car, and was charged with knowledge that at any moment such open platforms might be occupied by passengers passing to such dining car. Instead of moderating its speed over the curves, that the lurching of the car might not throw such passengers from the open platforms, it plunged its train into this crooked track at an unusually high speed, so great that two experienced railroad men, to prevent themselves from being thrown or injured by the lurching of the cars at the curves, refrained from doing their customary work, and the record discloses no warning given to the passengers of the intended high speed.

Very ordinary care, in view of the actual condition of open platforms permitted and suffered by the defendant, and the passing thereover at will by the passengers, and the crooked track, demanded a slow rate of running. To run, under these circumstances, at high speed, such as produced the commotion noticeable in this train was, we submit, most pronounced negligence.

FAILURE TO USE THE AIR BRAKE.

Finally, on the question of negligence, putting on the air brakes, or "touching the air" as it is called, steadies the train going around a curve—makes the hind cars drag on the front of the train and tends to make the train a rigid whole. It takes the slack out of the couplings, puts them on the stretch, and so prevents lateral swaying and oscillation or lurching of individual cars.

The air brake was not put on at that particular curve where the deceased was thrown off, and the jolt or swing of the car he was on at that point was in no way controlled, though the means were at hand for that purpose, and the engineer was charged with knowledge that a passenger might be on the open platform at that spot. (Trans., orig. pp. 351-354.)

A railroad company cannot act in disregard of the actual state of things which it permits or suffers. Its exhibition of care must be increased to meet the demands of such a state of things.

Lynn v. Southern Pacific Co., 103 Cal., 7; 24 L. R. A., 710.

ADVERTISEMENTS.

It would seem that negligence could not be more pronounced or censurable than is shown thus far in this case, but there is still an additional feature of aggravation. This defendant company to get custom and, therefore, to get money out of the traveling public, advertised that its trains, *carrying a dining car*, were solidly vestibuled (Trans., orig. pp. 280-283, 271-273), when it habitually carried a tourist sleeping car in every through train with open platforms, and did not have a vestibuled tourist sleeping car on the road. (Trans., orig. pp. 476, 743, 777.) It is not the moral aspect of the act that is of importance. The passenger was thus told that there was no open platform that he must take care in regard to. He was thrown off his guard. He would proceed through the train without the caution and care which he would naturally use in crossing open platforms, would be stripped of such protection, and would be ambushed by the open platforms under these circumstances. He would be induced to go from car to car, led to the open platform and so induced to cross it, even though when so doing he could *then* see that it was open.

THE SANSOM CASE.

It has been strongly insisted by the petitioner that there is no negligence and no right of recovery in the case at bar, under the ruling in the case of *Sansom v. Southern Ry. Co.*, 111 Fed. Rep., 887, it being contended that the ruling in that case, and of the court below in the case at bar, are in square conflict.

There is no conflict whatever between the Sansom case and the case at bar. In the Sansom case there was no dining car carried in the train constituting a standing inducement and incentive to all the passengers to go from one car to another. There was no standing invitation to all the passengers to use, at all times, another car than that they rode in, and there was an entire absence of the obligation on the carrier (present in the case at bar) to arrange the diner and the train so that the diner might be *safely* used in the manner directed by the carrier and for the purposes for which the carrier invited the passengers to use it. There was no element of negligence whatever shown in the Sansom case except the absence of the vestibule; *all* of the train devoted to through passengers was vestibuled, and there was nothing in the usual and ordinary use of the train, while in motion, because of which passengers would pass over and through the local part and over the unvestibuled platforms; and the unvestibuled car was placed, not in the *middle* of the vestibuled part, but at the extreme end of the train forward. It could not have been reasonably anticipated by the carrier that, while the train was in motion, passengers would be passing over the open platforms. They were not there for that purpose. Therefore it was not negligence to fail to arrange them for safe passage under such circumstances. On the other hand, in the case at bar, it was alleged and shown by the proofs that while carrying a diner, with a standing invitation to the passengers to use it and to pass to and from it at all times, a car was sandwiched

in the *middle* of the train which might have been carried at either extreme end (Trans., orig. pp. 531, 532, 554, 249), being unvestibuled *and* with the sides of its platforms entirely open so as to permit passengers falling therefrom as they passed over the platforms to and from the diner (Trans.. orig. pp. 84, 86, 386, 763, 764, 766, 768), and that, charged with the knowledge that passengers would be acting on the invitation and passing to and from the diner over these unguarded platforms, the petitioner ran its train at an excessive rate of speed around an exceedingly sharp curve. (Trans., org. pp. 104-106, 116-121, 128-134, 94, 95, 189-192, 142, 145, 149, 150, 187, 188, 175-180, 303.) It was further proved in the case at bar that the higher the speed the greater the jolt at the sharp curves (Trans., orig. pp. 660-663), and that, charged with the knowledge that at any sharp curve its invitation was being acted upon by its passengers and that they were passing to and from the diner over the unprotected platforms, while running the train at about sixty miles an hour, the air brake was not applied at the particular sharp curve where the deceased was thrown from the train (Trans., orig. pp. 351, 354). It was further proved that it was customary and proper, at sharp curves, when the train was running at high speed, to apply the air brake, to the end that the jolt or jar at such curve would be moderated and that such was the effect of the air brake when applied under such circumstances. (Trans., orig. pp. 351-354.)

These facts show the sharp and complete distinction between the Sansom case and the case at bar.

RULE OF CARE ON DEFENDANT.

The duty of the defendant, which all of these matters of negligence violated, is as follows: The undertaking and liability of the railway carrier of passengers goes to the extent that the carrier and its agents shall, as far as human care and foresight can go, transport them safely. Such carrier must prevent injuries to passengers in the course of their transportation which may be avoided or guarded against by the exercise, upon the part of the carrier, of extraordinary vigilance and foresight, aided by the highest care. And this caution, foresight and vigilance must necessarily be extended to all the agencies or means employed by the carrier in the transportation of the passenger. For the slightest negligence or fault in this regard the carrier is liable.

Pa. Co. v. Roy, 102 U. S., 451.
Ind. & St. L. R. R. Co. v. Horst, 93 U. S., 291.
Trumbull v. Erickson, 97 Fed., 894.
Phila. & Reading R. Co. v. Derby, 14 How., 485.
Steamboat New World v. King, 16 How., 469.

The rule relative to taking questions of negligence from the jury is thus stated in *Richmond & Dan. R. Co. v. Powers*, 149 U. S., 45:

"It is well settled that where there is uncertainty as "to the existence of either negligence or contributory "negligence the question is not one of law, but of fact, "and to be settled by a jury; and this whether the un- "certainty arises from a conflict in the testimony, or be-

"cause the facts being undisputed, fair minded men will "honestly draw different conclusions from them. "Sioux City & R. R. Co. v. Stout, 84 U. S. 17 Wall. 657; "Washington & G. R. Co. v. McDade, 135, U. S. 554; "Dela. L. & W. R. Co. v. Converse, 139 U. S. 469."

Gardner v. Mich. Cen. R. Co., 150 U. S., 361.

THE CAUSE OF DEATH.

Petitioner's complaint that there was not sufficient evidence to enable the jury to determine how the deceased came to his death seems hypercritical in the extreme.

The rule in one of the cases forced on the attention of the court below on behalf of the defendant in this connection, was thus stated:

"The circumstances themselves must be shown, and "not left to rest in conjecture; and, when shown, it must "appear that the inference sought is the only one which "can fairly and reasonably be drawn from these facts."

Ruppert v. Brooklyn Heights R. Co. (N. Y.), 47 N. E., 971.

It is of very little moment, in determining the sufficiency of evidence in a given case, that other evidence in other cases was held insufficient. It is with the facts shown in the case at bar that we are concerned.

There being no eye witnesses to the death, circumstantial evidence is necessary to prove the manner of it. We state the facts actually shown and not left to

conjecture, from which there is but one fair and reasonable inference to be drawn, viz., that deceased was killed by being thrown from the open platform by the lurching of the train and by falling upon the rocks below.

The theory of suicide is excluded by all the circumstances shown in the record as surrounding the domestic life of the deceased (Trans., orig. pp. 205-234), by his professional standing (Trans., orig. pp. 287, 290, 286, 274), by the circumstances attending the trip to Hope and the return up to the time of his disappearance, and by the presumption of law against suicide.

Standard Life and A. Ins. Co. v. Thornton, 100 Fed., 582.

Had the deceased gone off any other platform than one of the two open ones, he would have left the door open, and no effort was made by the defendant, whose employees had charge and continual supervision of the train, to show any such condition.

Death from assault by another person is excluded as follows: There is no evidence of enmity. There was no robbery; he carried little money and his watch, money and other property was on the body when found (Trans., orig. pp. 210-215, 714). The wounds were not made by pistol, or sharp instrument, were very numerous and in number and character were such as would naturally be made by the body striking several times on the rocks, when thrown from the train. Defendant, who had the control, inspection and cleaning of defendant's cars, did not attempt to show any blood on any of defendant's

cars, which would naturally have been there from the many wounds on deceased had they been inflicted on the train. The law will not presume, for the benefit of defendant, that a crime has been committed on its train. To create such a defense it must prove the fact. The presumption is the other way.

Timson v. Moulton, 3 Cushing, 269.
Hewlett v. Hewlett, 4 Edw. Ch., 7.
Savier v. Chipman, 1 Mich., 116.

The body was in the following condition: The nose was mashed down to the face, the upper lip cut through, and one eye destroyed and collapsed; the skull was broken and a piece sheared off, being contained in a large flap of scalp partly detached from the head; there was fracture of the base of the skull and a wound in the scalp on the back of the head; both bones of the left forearm were broken, the hand bruised and swollen, noticeably on the inside, and there were contusions on the surface of the limbs; there was a wound in the back of the chest to the left of the spinal column, ragged at the edges, which wound communicated with the interior of the chest cavity, and the lungs, heart or large blood vessels within the chest were ruptured. A piece of bone, together with some blood, was found on one of the rocks, showing how the wounds on the head were inflicted. The wound in the back was a three-cornered or triangular ragged wound, with the evidences of being punched by a rough blunt object, the triangular flap being pushed into the wound by the punching object.

The object most accurately fitting this wound would be a broken, rough, pointed triangular piece of rock. There was much broken rock on the ground. The terrific impact with the rocky ground of a body weighing over two hundred pounds, and hurled with the momentum of a heavy train running at fifty to sixty miles an hour, would readily rupture the vital organs in the chest, though there were no external wound in the chest wall. These traumatic conditions caused death. (Trans., orig. pp. 234-243, 265-269.)

Death from natural causes is excluded by the fact that the deceased was in perfect health (Trans., orig. pp. 216, 268), and that immediately before his death he appeared in perfect health (Trans., orig. p. 95). Dr. Penfield testified that the traumatic lesions caused death (Trans., orig. p. 268). The jury, therefore, was not at liberty to guess that deceased died from natural causes.

Now, in addition to the foregoing facts, the jury had the following affirmative facts shown from which to find the manner of the death.

After passing Pack River trestle, and just before reaching the point where the body was found, which was only one mile and 3,480 feet from Pack River trestle (Trans., orig, pp. 191, 292), deceased left the dining car with the cigars for himself and friend going toward his friend and the smoking car (Trans., orig. pp. 480-484). The car next the diner in front was the tourist sleeping car with two open unguarded platforms, over which deceased had to pass to reach his friend and the smoking car. Deceased was never seen on the train or alive

after stepping from the diner toward these open platforms. The train was running over the track opposite where deceased was found, in the neighborhood of sixty miles an hour, and whatever the exact speed, so fast as to make the cars lurch violently at the curves. The greater the speed and the sharper the curve the more violent the shock when the flanges of the wheels hit the sides of the rails and the train deviates from the straight line ("High and dangerous speed," *ante*, pp. 77-83; Trans., orig. pp. 660-663). This is common knowledge. Six degrees of curvature was the highest curvature between Hope and Spokane; the curve where the body was found was a six degree curve, very sharp (Trans., orig. pp. 303, 189, 190, map marked defendant's exhibit "A3"). It is usual when going fast to steady the train at curves and reduce the lurch by setting the air brake; the air brake was not set at this curve and the full force of the lurch remained unbroken and operated on the deceased unchecked (Trans., orig. pp. 351-354).

The body was found 108 feet in a diagonal line from a point on the track where the indications on the ground showed it left the train and 64 feet at a right angle from the convexity of the curve (Trans., orig. pp. 142-151, 175-178, 187-191, plaintiff's exhibit "C2"), showing the tremendous force communicated to deceased on the train and the great speed and lurch necessary to produce it. The tendency of the human body is to swing to the convex side of the curve, when the train strikes the curve (Trans., orig. pp. 657-663). The body was found on the convex side of the curve where it naturally would

be under the working of this rule; and the hat, cuff and other property of deceased was scattered along on the same side of the track. The hat, being lighter than the body, had received less momentum from the train and was, therefore, east of the body and nearer the track (Trans., orig. pp. 144-149, plaintiff's exhibit "B1," 186-196, exhibit "C2," and photograph marked exhibit ....., 709-714, 732, 733). The point on the track where the indications on the ground tended to show deceased left the train, was 125 feet from the beginning of the curve (Trans., orig. pp. 188, 190, plaintiff's exhibit "C 2" 144-146); his hold was therefore broken and he was tossed into space within an instant after the wheels engaged the curve and the shock was communicated to the car. His broken left arm (Trans., orig. p. 240), his left hand bruised on the inside (Trans., orig. pp. 240, 210), the ring which was on the left hand and which was broken and scarred also on the inside (Trans., p. 210, plaintiff's exhibit "R"), and one cuff pulled off, point to an instant of struggle to maintain his hold before his weight and the impetus of the lurch of the train and the swing outward of the body disengaged his hand.

It is urged that deceased had a "sudden fit of illness" or "stubbed his toe." His actual good health and his appearance of it immediately before he was thrown from the train (Trans., orig. p. 95) rebut both conjectures. But, assuming that he became sick, we are not aware that the duty of the carrier to exercise the highest care for the safety of his passengers, extends to them only when in a state of perfect health. A state of sickness

does not necessarily end in death. The presumption is in favor of the continuance of life. Thousands of men have lived useful and long lives after suffering such ills. Nor can a man be charged with contributory negligence, or with "assumption of the risk," through becoming sick, or through stubbing his toe. In the event of either condition a gate or vestibule would have saved deceased from death on the rocks, as probably would have done a chain or bar.

It is submitted that the "inference sought is the only one which can fairly or reasonably be drawn from" the facts shown in this case, viz., that from an open platform, by the lurching of a car at a curve, the deceased was thrown and killed, and that the jury was fully warranted in so finding.

Choctaw O. & G. R. Co. v. McDade, ... U. S., ..., decided Nov. 2, 1903.

Cameron v. Great Northern Ry. Co., 77 N. W. Rep., 1020.

Texas & Pacific R. Co. v. Gentry, 163 U. S., 353.

Felton v. Newport, 105 Fed. Rep., 332.

Home Benefit Ass'n v. Sargent, 142 U. S., 691.

McAfee v. Huidekoper (D. C. app.), 34 L. R. A., 720.

The demand for a peremptory instruction, which raises whatever questions this court can consider relative to the sufficiency of the evidence, is equivalent to a demurrer to the evidence and admits all the facts plaintiff's evidence tended to show, as the high speed, the

violent lurching at the curves, the points on the ground where deceased struck and lay, and the distances, etc.

Parks v. Ross, 11 How., 373.

"The case should not have been withdrawn from the "jury unless the conclusion followed, as a matter of "law, that no recovery could be had upon any view "which could properly be taken of the facts the evidence "tended to establish."

Tex. & Pac. R. Co. v. Cox, 145 U. S., 593.
Dunlap v. Northeastern R. Co., 130 U. S., 649.
Standard & Life Accident Ins. Co. v. Thornton, 100 Fed. Rep. 582.

But it is not within the province of this court to review the evidence in the record, to determine whether or not the inference drawn by the jury from the evidence was a reasonable one, or the only one that might fairly and reasonably be drawn, or to consider the weight of evidence, or to determine whether the jury was warranted in reaching the conclusion that the defendant caused the death of the deceased. The great speed and lurching, the open platform, the deceased being last seen stepping toward it, the sharp curve and the relation of the body to it, was, by itself, certainly *some* evidence tending to show the way the deceased was killed, irrespective of the balance of the evidence on this point.

"It is not for us to decide that the jury brought in a "wrong verdict under a correct charge, if the record

"shows, as it does, that there was *some* evidence to "support the finding which was made."

Chicago & N. Ry. Co. v. Ohle, 117 U. S., 123.
Hepburn v. Dubois, 12 Pet., 375.
Zellers Lessee v. Eckert, 4 How., 289.
U. S. Express Co. v. Ware, 20 Wall., 543.
Barreda v. Silsbee, 21 How., 146.
Gregg v. Moss, 14 Wall., 564.
South Pac. Co. v. Corey, 109 Fed., 416.

The impropriety of this court interfering with the verdict of the jury, is emphasized by the fact that a motion for a new trial was made and argued below, upon the ground of insufficient evidence to support the verdict, and the motion was overruled by the judge who saw and heard the witnesses testify (Trans., orig. pp. 76-80). Appellate courts are quick to refuse to interfere with the verdict under such circumstances.

Miller v. Bean, 13 Wash., 516.
McDougal v. Walling, 13 Wash., 80.

Defendant's Authorities on Cause of Death Distinguished.

It seems proper to notice some of the cases heretofore relied on by petitioner in its discussion of the cause of death.

There is no difficulty in distinguishing the case of *Patton v. Texas & Pacific R. Co.*, 179 U. S., 658, from the case at bar. That suit was between master and serv-

ant, not between passenger and carrier, which fact was markedly emphasized by the court in its opinion. The question discussed in that case was whether the master had been guilty of negligence. The question of negligence is a mixed question of law and fact, and because of this composite character it is always retained to a certain degree within the control of the court. The step was loose, and the question was whether there was any negligence on the part of the master; not whether negligence, which was proven, had produced a given result, but whether there was any negligence. If a *passenger* had been injured by the defective step, there would have arisen a *presumption* of negligence. (*Penn. R. Co. v. MacKinney* (Pa.), 2 L. R. A., 820.) In the case at bar the question is not one of negligence or no negligence. The question is—assuming the negligence to be clearly shown, as by the unguarded platform, the high speed at the curve, the failure to apply the air brake at the curve, the position of the unguarded tourist sleeping car in the middle of the train in connection with the use of the diner—assuming these things to constitute negligence, did that negligence, so shown, cause the death? In other words, was the deceased thrown from the train because of the open platform and the high speed, and the absence of the air brake at the curve, etc.? The question thus presented is one of pure fact, unmixed with any element of law, and is within the rule heretofore stated, that where there is *some* evidence to support the finding of the jury, the court will not interfere. But, even in a

question of negligence, in the case now being distinguished, the court, having said "that jurors are the recognized triers of questions of fact," further says:

"Hence it is seldom that an appellate court reverses "the action of a trial court in declining to give a per- "emptory instruction for a verdict one way or the other. " * * * * He has the same opportunity that jurors "have for seeing the witnesses, for knowing all those " matters in a trial not capable of record, and when in " his deliberate opinion there is no excuse for a verdict "save in favor of one party, and he so rules by instruc- "tions to that effect, an appellate court will pay large "respect to his judgment."

This "deliberate opinion" of the court below, in the case at bar, was exercised not only in refusing a peremptory instruction, but in denying the motion for a new trial. Further, in *Patton v. Texas, etc.*, the court says:

"And where the testimony leaves the matter uncer- "tain and *shows* that any one of half a dozen things "may have brought about the injury, for some of which "the employer is responsible, and for some of which he "is not, it is not for a jury to guess between these half "a dozen causes and find that the negligence of the "employer was the real cause, when there is no satis- "factory foundation in the testimony for that conclu- "sion."

Bailey on Master and Servant, cited by defendant below, says:

"It may be correctly stated as a rule in all cases that "proof of an alleged act or omission as causing injury "is not sufficient as long as other causes *exist* and *were* "*present* which might as well have caused it."

Not only was there nothing shown in the case at bar to be in existence, other than the negligence of the defendant, which might have caused the death of the deceased, but every *surmise and conjecture* which has been indulged in by the defendant to overcome the natural and logical conclusions deducible from the evidence, has been affirmatively rebutted. Suicide has been excluded (*ante*, p. 89). Assault, or the throwing of deceased from the train, by another person, has been affirmatively excluded by the facts (*ante*, pp. 89, 90), but such conjecture and surmise are further rebutted by the presumption against crime.

We have heretofore rebutted the surmise and conjecture that deceased died from natural causes, by showing that he was in perfect health, and appeared so, within a few minutes of his being thrown from the train (*ante*, p. 91), and there is the presumption in favor of the continuance of the existing state of things, to overcome which there was no evidence whatever.

The case of *Admr. of Wintuska v. L. & N. R. Co.*, 20 S. W., 819, is readily distinguishable. It was a suit between master and servant; the master was under no obligation to guard the top of the freight car so that the employee could pass over it without danger of falling off. There was no invitation to pass over *coupled with the obligation to make the passage safe.* A slight jar to

one on the top of a car would be sufficient to cause such a person to lose his balance and fall. It required considerable jar to throw the deceased from the platform, the presumption being that he was following the ordinary course and using ordinary care, and so holding on in crossing, but, if he lost his balance by a slight jar, he was still entitled to be protected in making the passage, by the vestibule, or a chain, or gate, or rail. In the Wintuska case, the evidence proved as a fact that the plaintiff *was so circumstanced* that he *might* have fallen from the top of the car; and, therefore, might *not* have been struck in going down the ladder. The evidence in the case at bar and the presumptions leave no other way for the deceased to have left the train than to have been thrown from the open platform by the motion of the car at the curve; and, while in the Wintuska case the *evidence* about the top of the car and the plaintiff on it was in the case showing an alternative way in which the disaster *might* have been occasioned, the evidence in the case at bar presents no alternative way for the disaster to have happened.

In the case of *Dobbins v. Brown*, 23 N. E., 537, "There was no proof that the follower had not always "operated as it was designed to do, *or of anything that* "*would on this occasion have been likely to impede its* "*natural operation.*" In the case at bar there *was* something shown in regard to the train that "would on this "occasion have been likely to impede its natural oper- "ation," so far as the deceased was concerned, namely the unguarded platform, the high speed at the curve,

the failure to use the air brake at the curve, and the position of the tourist car in the train.

In *Geoghegan v. Atlas S. S. Co.*, 40 N. E., 507, the theory being that deceased fell through an opening in the bulwark from the deck, the court said: "It was "proved that it was part of the duty of the deceased to "wash the silver after dinner and to pass out on deck and "throw overboard the water used for that purpose. No "one saw the deceased fall overboard, *nor did anyone see* "*him go on deck* * * * * There is no direct proof "as to how the deceased met his death. *There is nothing* "*to show that he fell through the open port* or that his "exit from the ship was accidental." While in that case the deceased was not seen to go toward the open port, or even to go on deck, whence falling through it would be possible, and there was *nothing* to show that he fell through the open port, in the case at bar the deceased was seen within three or four feet of the open platform, going toward it, and under such circumstances as to necessarily show that he intended to cross it. The other platforms being vestibuled and the doors closed (Trans., orig. pp. 441-444) and not found open, it was the only means of exit from the train for him. A lurch occurred to the car as the train reached the point opposite where the body was found. There are many other circumstances in the case at bar tending to show that the deceased was thrown from the open platform, while in the case just cited there were no circumstances whatsoever pointing to the way in which the deceased left

the ship, nor were any of the ways which conjecture might give rise to, rebutted.

In *Searles v. Manhattan Ry. Co.*, 5 N. E., 66, the plaintiff on the defendant's car was struck by a cinder. The evidence showed that the cinder might have come equally well either from the smoke stack or the ash pan of a near-by engine. The *evidence* proved that cinders did come from both places. This being the *proof* in the case, the court says: "When the fact is that the damages "claimed in an action were occasioned by one of two "causes, for one of which the defendant is responsible, "and for the other of which it is not responsible, the "plaintiff must fail if his evidence does not show that "the damages were produced by the former cause, and "he must fail also if it is just as probable that they were "caused by the one as by the other. * * * * * "There is no claim that the defendant is liable for this "accident if the cinder came from the smoke stack; but "the claim is that it came from the ash pan because it "was out of repair; but there was *no* evidence that the "ash pan was out of repair or that the cinder came "from it." In the case at bar there was no proof whatever tending to show any condition *in existence*, other than the defendant's negligence, which could have caused the disaster. It is shown that the train *was* out of repair, in that the platform was unguarded, and other acts of negligence tending to the production of the accident are shown in the high speed at the curve, and the failure to set the air brake, and it is clearly shown that it is *not* "just as probable" that the death was caused

by any other condition than the defendant's several acts of negligence.

In *Babcock v. Fitchburg*, 35 N. E., 596, the court says: "There is no evidence that any of the windows or doors "of the building were open or that there was then any "occasion for having them open, or that there was any "crevice or opening through which sparks *could* enter "the building. Persons looking on from a distance "saw the smoke, but no witnesses saw any sparks or "cinders." The court then recites that it was *proven* that powder mills are liable to explosion from the carelessness of men or defective machinery, and that Bennett, one of the employees, had entered the building a few minutes before the explosion, and further recites that the railroad had been operated by the mill for twenty-five years prior to the time of the accident, with the same kind of locomotives, without causing any injury. Under these circumstances the court naturally reached the conclusion that it was not proven what caused the accident; but it says: "If the natural tendency of the "operation of the defendant's railroad was to endanger "this mill by the sparks emitted from its locomotives, "the case would be different." In the case at bar, it is submitted, that "the natural tendency of the operation of defendant's" train around the sharp curve at about sixty miles an hour, with an unguarded platform, without applying the air brake at the curve, without warning to passengers, and with an outstanding invitation, which was generally acted on, for passengers to pass over such open platforms at will and at all times, "was

to endanger" the lives of such passengers, and that such "case would be different" from *Babcock v. Fitchburg*, as the learned court in that case said it would be. The mere fact that, theretofore, these various acts of negligence never happened to concur with the presence of a passenger on the platform, so as to kill such passenger, does not alter the "natural tendency" of such operation of defendant's train.

In *Pennsylvania R. Co. v. MacKinney*, 2 L. R. A., 820, something, probably a piece of coal, hit the passenger in the eye, and there was no evidence whence it came, and much strong evidence rebutting any inference that defendant was responsible for it. Plaintiff stood upon the bare assumption that because he was injured on defendant's train, therefore defendant was liable, and the court below so charged the jury. The supreme court reversed this case, holding that the negligence on the part of the defendant must be proven, and could not be inferred from the mere happening of injury to the plaintiff while on defendant's train. The court says: "Evidence was also introduced to prove that all the "appliances, machinery, etc., of the road, including the "engine, were in good order, and that the latter were "properly provided with spark arresters. There was no "derailment of the train, no collision, no breaking of "any machinery, nor any evidence of anything wrong "with the passing train or cars."

In the case at bar there *was* something wrong with the passing train, and the many acts of negligence on the part of the defendant have been pointed out.

In the case of *Benedict v. Potts*, 41 L. R. A., 478, the plaintiff was on the car when it went in the tunnel, and was not on the car when it came out of the tunnel, and the court says: "There was some evidence tending to "show that a part of the board running down the center "of the tunnel roof had been slabbed off at one point, "but there was nothing to indicate when that had hap- "pened. The car did not leave the track, no part of it "was shown to be out of repair, the track was not de- "fective, and *no* explanation is given in the record as to "what caused the injury."

This involves the same principle as the case just cited. The plaintiff relied on the fact that he was injured on defendant's car to raise a presumption of negligence. In the case at bar the question is not that of negligence, but an unmixed question of fact, the many elements of defendant's negligence being strongly shown, together with the circumstances logically and certainly pointing to its operation upon the deceased, resulting in his death.

In the case of *Providence & Stonington Steamship Co. v. Clare*, 127 U. S., 45, the deceased was seen on the steamer shortly before the collision, through which collision the steamer burned and sank in Long Island sound. He was not seen at the time of the collision, nor was his body found in the neighborhood of the wreck, nor even in the water any where. Two days afterward the body of the deceased was found in the city of Stonington. This is the whole of the evidence in the case tending to show that the deceased, or any person, was killed by the collision and the sinking and the

burning of the steamer. The body was not found at the place of disaster, nor how the deceased got to Stonington in any way accounted for, nor was it proved whether he arrived there living or dead, in good health, or injured, or sick. It was not proved that the body bore evidences of death from drowning, or burning, or any kind of violence. In the case at bar the deceased was seen on the train, within less than two minutes of its reaching the point where his body was found, passing toward the open platform. He never reached the smoking car toward which he was proceeding, and to which the purchase of the two cigars and the reason for his leaving it, and the presence of his overcoat and friend there, all showed he intended at once to return. He was not on the train when it reached Spokane. He was found immediately in the neighborhood of the defendant's track, and at the exact point where the operation of the defendant's negligence, to-wit: the high speed at the curve, the open platform, the failure to use the air brake at the curve, would have naturally placed him. There was no way for him to get to the spot where he was found except by being thrown there from the train, because the train made no stop between Hope and Sand Point. He bore unmistakable evidence of death from violence. These circumstances, with the large amount of additional circumstantial evidence in the case at bar, as contrasted with the meager evidence in the case now being discussed, forcibly distinguish the two.

In *Bond v. Smith*, 21 N. E., 128, the court says: "How did the accident happen? How came he to fall

"over the stone coping into this known place of danger?
"*The evidence does not tell us;* it is an unsolved mystery;
"*no plausible theory can be suggested to account for it.*"

In the case at bar the evidence does tell us, with all the certainty of which circumstantial evidence is capable, how the accident happened. There *is* a very plausible, reasonable and probable theory which "can be suggested to account for it." The case at bar is thus radically distinguished from *Bond v. Smith.*

These are the cases which defendant has heretofore considered its leading cases, and on which it has laid most stress.

Finally, it has been urged that no lurch was proved to have taken place at the particular curve where deceased was thrown off. It was proved that there were successive lurches from the trestle to Sand Point at the curves; that this was the sharpest curve between the two points (Trans., orig. pp. 309, 301); that the train was running about sixty miles an hour; that the oscillation of the train was not moderated at that particular curve by the use of the air brake; that the outer rail was raised so that, *theoretically*, the flanges of the wheels would not strike the rails and create the lurch *going at forty miles an hour*, but *practically* and in fact they *would* strike and create the lurch even at that speed, and that the higher the speed the greater the blow of the flanges of the wheels when the car engaged the curve. (Trans., orig. pp. 659, 661, 662.) We think the court would take judicial notice of a lurch at a sharp curve, at high speed with a heavy train, even if the record had been silent.

"Assumption of the Risk," or Contributory Negligence

(Assignment of Error 30, Trans., orig. p. 851.)

On its assertion that there are only two elements of negligence in the case, viz., high speed and the absence of the vestibule, which assertion we have shown to be erroneous (*ante*, pp. 66-69), petitioner insists that the deceased crossed the platforms knowing that they did not have the vestibule appliance, and that, "so far as the "unvestibuled condition of the platforms is concerned, "the case is a plain one of risk assumed by the de-"ceased." The quotation is from page 20 of petitioner's brief on the application for the writ of certiorari, where it is further said that since the negligence as to the vestibule appliance was overcome or neutralized by the assumption of the risk as to it by the deceased, and it could not be determined whether the jury rested its verdict on the absence of the vestibule appliance or upon the high speed, the judgment must be reversed.

That there is such a doctrine or rule in *the law of common carriers of passengers* as "assumption of the risk," which would constitute a defense to petitioner's negligence, is a proposition of law to be dealt with by the court, and it is urged that, though the facts as to the conduct of the deceased went to the jury and the jury found on the facts that the conduct of deceased did not bar a recovery, this court will declare as a matter of law that "assumption of the risk" shows the judgment to be erroneous.

We have shown that the evidence as to the vestibule went in by the consent of petitioner and without objection. (*Ante*, pp. 67-68.)

The jury was instructed that contributory negligence by deceased would bar the action (Par's 30, 44, 45, 46, 47, Trans., orig. pp. 812, 819-821). No exception was taken to these instructions to the jury to consider the conduct of deceased in relation to contributory negligence, instead of in relation to "assumption of the risk," and no instruction was asked on "assumption of the risk" (Trans., orig. pp. 825-830). To save this point an instruction should have been requested, and, petitioner failing so to do, the point is waived and cannot be raised here.

In *Carter v. Carusi*, 112 U. S., 478, the court said:

"But even if there had been evidence to support the "plea, as it does not appear that the court was requested "to charge the jury upon the issue raised thereby, the "failure of the court to do so cannot be assigned for "error."

Express Co. v. Kountze, 8 Wall., 342.
Pennock v. Dialogue, 2 Pet., 15.

The power of this court to review is confined to exceptions actually taken at the trial. The matter must have been presented to the trial court for its ruling.

Pittsburg, Cin. & St. Louis Ry. Co. v. Heck, 102 U. S., 120.
Zellers Lessee v. Eckert, 4 How., 289.
Phelps v. Mayer, 15 How., 160.
Belk v. Meagher, 104 U. S., 279.

But if this point were competently before the court, the proposition that outside of and in addition to the doctrine of contributory negligence, and outside of the law of master and servant, there is a principle of law to the effect that a person having knowledge of the unvestibuled condition of the platforms and crossing them with that knowledge, cannot recover for the negligence of the defendant in leaving the platforms uninclosed—or open at the sides—that passing over the defective way with knowledge of the defect, as a matter of law, is a plain case of risk assumed by the deceased, and a bar to a suit for the negligence occasioning the defect and consequent injury, is uttery unsound. It is sufficient to say that the law knows no such doctrine. Mere knowledge of the defect when passing over the platforms is not, as a matter of law, a bar as being an "assumption of the risk."

Crane Elevator Co. v. Lippert (C. C. A.), 63 Fed., 942.

Ind. & St. L. R. R. Co. v. Horst, 93 U. S., 291.

Kelly v. Blackstone, 147 Mass., 448.

Lawless v. Conn. River R. Co., 136 Mass., 1.

Looney v. McLean, 129 Mass., 33.

Harris v. Township, 64 Mich., 447; 8 Am. St. Reps., 842.

Nolan v. Brooklyn City & N. R. R. Co., 87 N. Y., 62.

The Evansville & T. H. R'd Co. v. Crist, 116 Ind., 451.

III

The doctrine of "assumption of the risk" has no place in the law of common carriers of passengers. The expression and doctrine have their birth and exclusive application in the law of master and servant. The "assumption of the risk" rests on an implied contract between the master and the servant. The contract implied is that the servant takes the risk of the negligence of other servants of the same master, engaged in the same work; that is, he "assumes the risk," and by so doing releases the master from the operation of the rule of *respondent superior*. There is no principle of law out of which an implied contract can be raised between the carrier and the passenger on which the "assumption of the risk" of the carrier's negligence can rest, and it can not be made to rest elsewhere than upon an implied contract.

Chicago & St. P. R. R. Co. v. Ross, 112 U. S., 377.
Gardner v. Mich. Cen. R. R. Co., 150 U. S., 349.
Balt. & O. R. R. Co. v. Baugh, 149 U. S., 368.
Farwell v. Boston & Worc. R. R. Corp., 4 Met., 49.
Hutchinson v. York N. C. & B. Ry. Co., 5 Exch. 351.
McNaughton v. Caledonian Ry. Co., 19 Ct. of Sess. Cases, 273.
Bartonshill Coal Co. v. McGuire, 3 McQueen H. L. Cases.

If a contract may be implied between the carrier and its passenger, whereby the carrier may be released from the necessity of taking care, the passenger undertaking —agreeing—to incur the risks, such a contract may be

written, and the carrier may limit his liability by the passenger himself assuming all of the risks incidental to railway travel. If this doctrine may be invoked between a carrier and passenger, the law must necessarily presume, from the act of the passenger, that he voluntarily exposes himself to the consequences of the carrier's negligence, and that he intends, and by the act declares his intention, that the carrier shall not be liable to him for injury from such negligence—that he "assumes the risks." This is an agreement on the part of the passenger that the carrier shall not be liable for its own negligence. Such an agreement or consent can not, as this court has heretofore ruled, be enforced, but even though an express agreement to this effect could be enforced, the law will certainly not *create* such a contract by *implication*.

The *N. J. Steam Nav. Co. v. The Merchants Bank*, 6 How., 383.

This doctrine has no place in the case at bar, and the only way in which the action of the deceased can be called in question, if at all, is under the doctrine of contributory negligence.

Crossing an open platform, even though deceased knew it to be so, was not *per se* contributory negligence. This is true in the abstract; it is especially true where the passenger crosses at the invitation of the carrier. The deceased, if he knew that the platforms were *entirely* unguarded at the sides, had the right to assume that the train would be run with great care at the curves

in view of the invitation to cross and the open condition of the platforms.

McAfee v. Huidekoper (D. C. App.), 34 L. R. A., 720.
Ches. & O. R. Co. v. Clowes, 93 Va., 189; 24 S. E., 833.
Graham v. McNeill, 20 Wash., 466.
Werle v. Long Island R. R. Co., 98 N. Y., 650.
Vaslee v. Grant, etc. R. Co., 16 Wash., 602.
Warner v. B. & O. R. Co., 168 U. S., 339.
Craven v. McLeod, 92 Fed. Rep., 846.

In the absence of an eye witness the law presumes that, at the time of the accident, the deceased was in the exercise of due care, and the burden of proof to the contrary, by a preponderance of the evidence, was on the defendant.

Tex. & Pac. R. Co. v. Gentry, 163 U. S., 353.
Cameron v. Gt. N. Ry. Co., 77 N. W. Rep., 1020.
Ind. etc. R. Co. v. Horst, 93 U. S., 291.
Phillips v. Mil. & N. R. Co., 77 Wis., 349; 46 N. W., 543.

If there was any ambiguity in the instruction in this regard, it was the duty of the defendant to bring it to the attention of the trial court and have it corrected.

Ind. etc. R. Co. v. Horst, 93 U. S., 291.
Flanders v. Tweed, 16 Wall., 504.
Balt. & P. R. Co. v. Mackey, 157 U. S., 96.

The question of whether the conduct of the deceased constituted contributory negligence, if in this case at all, was clearly for the jury and not for the court.

Richmond & Dan. R. Co. v. Powers, 149 U. S., 45.
Grand Trunk R. Co. v. Ives, 144 U. S., 408.

On page 20 of petitioner's brief, on the application for the writ of certiorari here, petitioner complained of the Circuit Court of Appeals, saying that it "so far failed to "apprehend the defendant's position as to say (Trans., "orig. p. 886) our claim was that he (deceased) was "guilty of contributory negligence in passing over the "platforms. No such proposition was made in the court "below or will be asserted here," the offense of the court below being that it failed to recognize the doctrine of the "assumption of the risk" as that upon which petitioner could defend. It is not surprising that the Circuit Court of Appeals, as well as the trial court, should have failed to understand that the defendant did not assert and rely upon contributory negligence on the part of the deceased, but was relying on "assumption of the risk," in view of the fact that the defense of contributory negligence is expressly and fully set up in defendant's amended answer (Trans., orig. p. 62) on which it went to trial, and in which there is no word of "assumption of the risk," and in view of the fact that the record is barren of any request for an instruction as to the latter doctrine.

In view of this condition, not knowing exactly what will finally be contended for here, we deem it wise to

present to the court the facts showing the actual conduct of the deceased, for their bearing either on the doctrine of contributory negligence, or that of "assumption of the risk."

And first we call attention to a misstatement of fact made in petitioner's brief on the application for the writ, and which we presume will be repeated for its bearing on the doctrine of the "assumption of the risk," namely, that the deceased, in boarding the train, got on by an unvestibuled platform.

This court will not consider the weight of evidence, and for all purposes here the evidence on behalf of the plaintiffs controls. Mr. Gabbert swore positively that he and Mr. Adams (deceased) got on the train between the day coach and smoking car (Trans., orig. pp. 89, 95), and he remembered that the day coach was vestibuled and he did not remember as to the smoking car (Trans., orig. pp. 95, 98). It is an admitted fact in the case that both the smoking car and the day coach were vestibuled (Trans., orig. p. 85). It is apparent, therefore, that the deceased and Mr. Gabbert boarded the train by a vestibuled platform according to this evidence, that it was not admitted to the contrary, and that, if there was evidence in conflict with this, it was at most a question for the jury.

It was also stated in the same brief (p. 18), that the trial court instructed the jury that it was true that deceased got on the train by an unvestibuled platform. This assertion is entirely without warrant and is not correct. The court assumed that the platforms were open to the view when approached by any one with the

intention of crossing. The tourist car being between the smoker and the dining car, the deceased crossed both platforms of the tourist car in going to the diner, and since the deceased *could*, as the court assumed, see the absence of the vestibules when he approached each platform of the tourist car when going to the diner from the smoker, the court held that he did see that the tourist car was without vestibules, and acted in passing over the platforms with that knowledge (Trans., orig. p. 820). The instruction cannot be tortured into more than this.

The deceased left the smoking car to go the diner shortly after the train left Hope, and while the train was going at a moderate rate of speed (Trans., orig. pp. 90, 91, 94, 104, 105, 116). The *usual* rate was moderate from Hope to Sand Point (Train schedule, exhibit A6). He did not leave the smoker until after the conductor had taken up his fare (Trans., orig. pp. 387-391). The train went at moderate speed until it reached about the east end of the Pack River trestle (Trans., orig. pp. 90, 91, 94, 104, 105, 116.), which point was about four miles from Hope. In order for the deceased to have gotten from the smoker into the diner, and to have transacted his business there, and to have started back by the time the train reached the point where his body was found, it was necessary for him to leave the smoker shortly after leaving Hope, and before the train reached the east end of the trestle. He was a short, heavy man, and necessarily moved slowly. He had to go from the front end of the smoker back to its rear end, open and close the door of the smoker,

cross the platform of the smoker and the platform of the adjoining day coach, open and close the door of the day coach, passing within, pass down the length of the day coach, open the door of the day coach, pass out, close it, cross the platform of the day coach, cross the platform of the tourist sleeping car, open the door of the tourist sleeping car, pass in, close the door, pass down the length of the tourist sleeping car, open the rear door of the tourist sleeping car, pass out, close it, cross the platform of the tourist sleeping car, cross the platform of the dining car, open the door of the dining car, pass within, close the door and pass to the center of the dining car, where he took a seat; during all of which the train was rolling on. He then had a conversation with the waiter in the dining car, telling him that he desired cigars. The conductor of the dining car was absent, and the waiter went back half the length of the dining car, opened the rear door, passed out, closed it, crossed the rear platform of the dining car, crossed the front platform of the Pullman sleeper, opened the door, passed within, closed the door, and passed down a part of the length of the sleeping car until he found the conductor of the dining car. The waiter then told the conductor of the dining car that there was a gentleman in the dining car who wished cigars; the conductor of the dining car then returned with the waiter, going part the length of the Pullman sleeping car, the door of which the waiter opened, and the conductor passed through, crossed the two adjoining platforms, opened the door of the dining car, passed within,

and passed half its length forward to where the deceased was sitting, who rose to meet him. A conversation then took place in which the deceased stated that he wanted cigars and indicated the kind he wanted; the dining car conductor then went back to the locker in which the cigars were kept, the door of which was locked, took from his pocket a bunch of keys and selected therefrom the appropriate key, unlocked the door, found within, from the various boxes of cigars, the box containing the kind of cigars which the deceased desired, and returned with them to the deceased, who thereupon gave the conductor a quarter in payment. Thereupon the deceased turned and walked slowly forward half the length of the dining car, opened its front door, passed out and closed it (Trans., orig. pp. 475-490).

During all of this progress through the train, and the waiting for the conductor in the dining car, and the transaction of the business there, the train was rolling on, and, at the time the deceased turned from the conductor of the dining car to go forward, the train was off the west end of the Pack River trestle (Trans., orig. p. 482). It is manifest that for a heavy man, over 200 pounds, to make such a journey through the train, wait in the diner as he waited, and be through with his business in the dining car just after the train left the west end of the Pack River trestle, he must have left the smoking car shortly after the train left Hope, and a considerable time before high speed was developed, and he had no warning which could have induced him to keep his seat in the smoker. The high speed began about the west end of the Pack River trestle

(Trans., orig. pp. 105, 117, 118); the train was going fifty miles an hour just west of the trestle (Trans., orig. pp. 117, 118, 105, 106), and from that up to sixty miles an hour at the point where the body was found (Trans., orig. pp. 104-106, 117-118, 128-134, 94, 95). From the west end of the Pack River trestle to the point where the body was found was one mile and 3,480 feet, or forty feet less than one mile and two-thirds (Trans., orig. pp. 191, 192, 142, 145, 149, 150, 187, 188, 175-180). The train, therefore, ran, after the high speed developed, about a mile and two-thirds with the deceased on it, and ran that mile and two-thirds at from fifty to sixty miles an hour, according to the testimony. If we make a conservative average of the testimony, and say fifty-five miles an hour, we have nearly two minutes consumed in running from the west end of Pack River trestle to the point where the deceased was thrown from the train, and, therefore, on this average, the very high speed was in operation less than two minutes before deceased was thrown off. During a part of this two minutes the deceased had his mind occupied in the purchase of the cigars from the dining car conductor, and it was, during all the time, fixed on returning to the smoking car where his overcoat was left and his friend awaited him. The sharp curves, such as would produce lurching and might call an ordinary traveler's attention to excessive speed, were some little distance west of the west end of the Pack River trestle. Immediately east of the curve at which deceased was thrown from the train is a tangent, a perfectly straight piece of track, 990 feet in

length, on which the train would run steadily without lurching or lateral motion (Trans., orig. p. 190). Now, under these circumstances, it has been seriously urged that this court will usurp the functions of the jury and will conclusively presume that within this flash of time, the deceased did fully realize and know that the defendant had raised its speed to a dangerous pitch, and would maintain it at such point, so that it would be perilous for the deceased to return to the smoking car. To so assume that he would have known within this brief space that the speed was such as would put him in peril in crossing the platforms, charges the deceased with an instantaneous perception of changes in the condition of speed *and the reaching of the danger point*, which is not had by mankind at large. This is a matter also which one not connected with the train would be slow to give his attention to, it not being his duty to notice and observe such matters, nor is he charged primarily with his own safety in regard to them. He had the right to be slow to realize that the train would be run at such speed as to put passengers, while rightfully conducting themselves upon it, in peril. The dining car conductor, a railroad man of long experience, evidently did not realize, at the time deceased left the dining car, that the running of the train had been so changed in that scant period as to make the ordinary uses of it attended with peril, for he watched the deceased slowly leave the car, which the open platform adjoined, without a word of warning (Trans., orig. pp. 481-483). If, however, the dining car conductor, from his great familiarity with

trains, and with the duty on him of protecting passengers, had so quickly realized the change in the running of the train from a normal condition to one of danger to passengers, and if the deceased, notwithstanding the natural presumption and rightful reliance on the fact that the train men were doing their duty, might have been as quick as the expert to note such change and its import, the action of his mind to this effect and to the realization of his danger, would have been clogged and stopped by the silence of the experienced and responsible dining car conductor, which silence proclaimed to him that what he was then doing, under that conductor's eye, might be safely done.

Even though the deceased can be held charged, at his peril, to know the rate of speed maintained each minute by the carrier, whose duty it is to maintain a safe speed every minute, and must be further held to be able to apportion properly the increase of danger to each additional mile in the rate of running, yet, nevertheless, with a space of only two and a half or three feet to cross, with the invitation of the carrier to cross it, with the conductor looking on without warning or objection, and with the air brake to moderate the lurching at the curves, the failure to use which the deceased could not anticipate, with the exercise of care by the deceased in crossing (he was exercising care when last seen. Trans., orig. pp. 482, 484), having been induced to go to the dining car by the rightful presumption that he might return to the smoker safely, his overcoat and companion being in the smoker, and the dining car being neither a

smoking car or a sitting car—the doing of the act does not import such peril as to make it, under these circumstances, an unreasonable act for an ordinarily prudent man to do, and it is certainly not, as a matter of law, negligence.

Mere knowledge of the greater speed maintained, if the deceased had it, does not make the question one for the court. It is still a question for the jury whether, *in view of all the attending circumstances*, going back to the smoker was negligence.

Crane Elevator Company v. Lippert (C. C. A.), 63 Fed., 942.

New Orleans & N. E. R. Co. v. Thomas (C. C. A.), 60 Fed., 379.

Ind. & St. L. R. R. Co. v. Horst, 93 U. S., 291.

Filer v. N. Y. Cent. R. R. Co., 59 N. Y., 351.

If it be assumed that the increased volume of sound, as the deceased took the step across the narrow platform, necessarily told him that the platform was not vestibuled, it would not necessarily have told him that the carrier had defaulted in his whole duty and had not put a chain, or rail, or iron gate at the sides of the platform.

In taking the step across the platform, on a moving train, a careful man necessarily fixes his eyes directly in front of him on the rail or object which he intends to grasp to steady himself, and does not look to the sides of the platform. This is common experience, and the deceased may well have crossed the open platform without acquiring the knowledge that it was not guarded by

rail, chain or gate, as it should have been, and he therefore cannot be held charged with the knowledge that the platforms were *entirely* unguarded. In this connection also the facts are pertinent that deceased's eyesight was not good (Trans., orig. p. 213), and it was a cloudy day and growing dark (Trans., orig. pp. 100, 101, 108, 114, 260, 261).

"If inferences other than that of contributory negli-
"gence may be fairly drawn from all the evidence and
"facts shown to exist, then the question is one of fact for
"the jury to decide * * * * 'In general, it cannot
"'be doubted that the question of contributory negli-
"'gence is a question of fact, and not of law. Whenever
"'there is any doubt as to the facts, it is the province of
"'the jury to determine the question; or whenever there
"'may reasonably be a difference of opinion as to the in-
"'ferences and conclusions from the facts, it is likewise a
"'question for the jury; it belongs to the jury not only
"'to weigh the evidence and to find upon the questions
"'of fact, but to draw conclusions as well alike from
"'disputed and undisputed facts.'"

Southern Pacific Company v. Harada (C. C. A.), 109 Fed., 379.

All of these many circumstances bearing on whether the deceased was guilty of negligence or not, have been passed upon by the jury; the judge who heard the evidence and saw the witnesses refused a new trial (Trans., orig. pp. 676-80).

In the language of the court in *Sioux City & Pac. R. R. Co. v. Stout*, 17 Wall., 657:

"It is this class of cases and those akin to it that the "law commits to the decision of a jury. Twelve men "of the average of the community, comprising men of "education, and men of little education, men of learn- "ing and men whose learning consists only in what "they have themselves seen and heard, the merchant, "the mechanic, the farmer, the laborer; these sit to- "gether, consult, apply their separate experience of the "affairs of life to the facts proven, and draw a unani- "mous conclusion. This average judgment thus given "it is the great effort of the law to obtain. It is assumed "that twelve men know more of the common affairs of "life than does one man; that they can draw wiser and "safer conclusions from admitted facts thus occurring, "than can a single judge."

III.

Assignments of Error 2, 3.

(Trans., orig. pp. 836-7.)

The evidence complained of was that as the deceased left the smoking car he stated that he was going to the dining car to get cigars (Trans., orig. pp. 90, 91).

The fact to be proved was that deceased was thrown from an open platform and so killed.

His *intention* to go to a car to reach which he had to cross such open platform, would make it probable that he did go and did cross such platform, and would be,

therefore, a distinct fact in the chain of circumstances pointing to the manner of his death. This evidence was properly admitted.

Mut. Life Ins. Co. v. Hillmon, 145 U. S., 285.
Inness v. Boston R. B. & L. Co. (Mass.), 47 N. E., 193.
2 *Jones Law of Evidence*, § 351, note 5.

But if this were not so and its admission was error, it was error without prejudice, because the defendant itself by its own witness proved the only fact shown by this evidence, viz., that the deceased did go to the dining car and did leave there on his return toward the smoking car, and so passed on to the open platform of the tourist sleeping car, which lay between the diner and smoking car (Trans., orig. pp. 480-484). Further, defendant admits that deceased went to the dining car and purchased a cigar, and left the diner to return to the smoking car (Amended answer, par. 7, Trans., orig. p. 60). This testimony could have no other bearing.

Error without prejudice is not ground for reversal.

Cavazos v. Trevino, 6 Wall., 773.
Chicago v. Greer, 9 Wall., 726.
Brobst v. Brock, 40 Wall., 519.

Assignments of Error 4, 5.

(Trans., orig. p. 837.)

The distances between the place where the body lay when found, the places where it appeared to have struck,

and various points on the track, were material to the issue as tending to show how the deceased came to his death, and the high speed of the train. The work called for a civil engineer, and the only way to secure accurate measurements and relations of the body to the track, and so to the train, was for a competent engineer to determine them. Mr. Bowen was a civil engineer, and testified as to what he was told only to show that the measurements were made from the material points on the ground to which the witnesses, who pointed them out to Mr. Bowen, themselves testified.

There is no element of hearsay in the testimony. The measurements were in Mr. Bowen's own knowledge. It was not attempted to prove by him where the body struck or lay. These points were competently proved by the witnesses who examined the ground at the time the body was lying there (Trans., orig. pp. 191, 192, 142-145, 149, 150, 187, 188, 175-180).

Assignments of Error 6, 7, 8, 33.

(Trans., orig. pp. 837-8, 854.)

The fact that the deceased was, at the time of his death, giving the plaintiff Frank H. Adams a college education, maintenance and support, and the intention of the deceased, shown in the plans arranged by himself and the said plaintiff, for a continuance of the education in progress, at the Harvard Law School, and the intention of the father to instruct the said plaintiff in the practice of the profession of law, were all facts certainly giving the son a reasonable expectation of future benefits from the

father, having a pecuniary value, and was evidence tending to show the jury the reasonableness of the said plaintiff's expectation in that regard.

A reasonable expectation of pecuniary benefit is all that it is necessary to prove to entitle plaintiffs to recover:

"The damages must be based on pecuniary loss, "actual or expected, and should be calculated in refer- "ence to a reasonable expectation of pecuniary benefit, "as of right or otherwise, from the continuance of the "life. Potter v. C. & N. W. R. Co., 12 Wis., 371; "Evans v. C. & N. W. R. Co., 38 Wis., 613."

Shober v. St. P. M. & M. Ry. Co. (Minn.), 9 N. W., 575.
Scheffler v. M. & St. L. Ry. Co., 21 N. W., 711.
Collins v. Davidson, 19 Fed. Rep., 83.
Serensen v. Northern Pac. R. Co., 45 Fed. Rep., 407.
Texas & Pac. Ry. Co. v. Wilder, 92 Fed. Rep., 953.
Demarest v. Little, 47 N. J. L., 28.
City of Chicago v. Keefe, 114 Ill., 229, 230.
Ill. Cent. R. R. Co. v. Barron, 5 Wall., 90.
O. & M. Ry. Co. v. Voigt, 122 Ind., 288.
Oldfield v. N. Y. & H. R. R. Co., 14 N. Y., 310.
O'Mora v. Hudson R. R. R. Co., 38 N. Y., 445.

The loss for which compensation may be recovered is not restricted to actual money, but to anything having a pecuniary value, as education, instruction, etc., etc.

Tilley v. Hudson R. R. R. Co., 24 N. Y., 471.
I. C. R. R. Co. v. Weldon, 52 Ill., 294.
Walker v. McNeil, 17 Wash., 582.

Damages are not restricted to the loss of pecuniary benefits which the plaintiffs had a legal right to demand of the deceased, nor, where the plaintiff is a child of the deceased, must he be a minor child in order to recover; there is no such restriction on the right to sue, or on the age at which the pecuniary loss must be sustained, in the statute. As was said in *Louisville, E. & St. L. R. Co. v. Clarke*, 152 U. S., 240:

"The statute imposes no other condition upon the "right to sue. The court has no authority to impose "an additional or different one."

Illinois Central R. R. Co. v. Barron, 5 Wall., 90.
Texas & Pac. Ry. Co. v. Wilder, 92 Fed. Rep., 953.
Collins v. Davidson, 19 Fed. Rep., 83.
Serensen v. N. P. R. R. Co. 45 Fed. Rep., 407.
Demarest v. Little, 47 N. J. L., 28.
Tilley v. Hudson R. R. R. Co., 24 N. Y., 471.
City of Chicago v. Keefe, 114 Ill., 229 230.
Shober v. St. P. M. & M. Ry. Co. (Minn.), 9 N. W., 575.

The objection to the testimony of the witness Frank H. Adams, rests substantially on the ground that it is immaterial what was the *intention* of the deceased.

The reasonable prospect and expectation of the plaintiff, Frank H. Adams, to receive pecuniary benefits from the deceased, rested entirely on the *intention* of the deceased. That intention might be inferred from the doing of present acts of benefit, from the parental relation and from the earnings of the father, but it is submitted that

to raise a reasonable expectation of legal education and the instruction and start of the son in the practice of the law, and his maintenance and support after he became of age, the declaration of such an *intention* on the part of the deceased, was both material and competent to *aid* the jury.

Mut. Life Ins. Co. v. Hillmon, 145 U. S., 285.
A. T. & S. F. Ry. Co. v. Ryan (Kan)., 64 Pac., 603.

The fair value of the Harvard Law School course was the cost, and it was certainly competent evidence to aid the jury in reaching a conclusion. That the plaintiff, Frank H. Adams, who was suing in his individual right, and not as administrator was also administrator of the estate of the deceased, is quite immaterial in this connection.

The statute of Idaho governs the damages.

Northern Pac. R. Co. v. Babcock, 154 U. S., 198.

In the absence of any restriction there, it is a question of general law for this court.

Lake Shore & Mich. South. Ry. Co. v. Prentice, 147 U. S., 101.

Assignment of Error 9.

(Trans., orig. p. 839.)

Funeral expenses, if paid by the plaintiffs, are a proper element of damages.

Owen v. Brockschmidt, 54 Mo., 289, 290.

Petrie v. Col. G. R. Co. (So. Car.), 7 S. E., 515-523.
Murphy v. New York Central & Hudson R. R. R. Co., 88 New York, 445.
Pa. Co. v. Lilly, 73 Ind., 254.
Tiffany on Death by Wrongful Act, § 157.

There was no testimony introduced, however, showing, or tending to show that the plaintiffs, or either of them, paid the funeral expenses of the deceased. The only evidence in the record touching the funeral expenses is that of Frank H. Adams (Trans., orig. pp. 230, 231). This evidence consists merely of some preliminary questions; first as to whether he *knows* the cost of the interment of his father, and second, what that cost was. The testimony on the subject there stops; he is not asked who paid it; he does not state who paid it, and there is no evidence introduced showing who paid it. If the proof of loss in the way of funeral expenses were incompetent, and the proof of the cost had been followed by proof that the amount was paid by the plaintiffs, the question and answer relative to the cost might have been prejudicial. Standing alone, without any evidence whatever that plaintiffs paid it, or became obligated to pay it, it was without prejudice. It will not be presumed that the jury gave plaintiffs the amount of the funeral expenses, in the absence of any evidence whatever that they suffered any loss by having to pay them. The testimony regarding the cost of interment, therefore, is without prejudice.

Lancaster v. Collins, 115 U. S., 222.

And in this connection the harmless character of the question and answer is aided by the court's charge that the plaintiffs could recover only for pecuniary loss (Trans., orig. p. 852).

Assignment of Error 10.

(Trans., orig. p. 839.)

The minute characteristics of a wound could not be described so as to enable one without experience in such matters, or surgical knowledge, to form an accurate idea as to how it was made. From the nature of the case an opinion was admissible (Trans., orig. pp. 238, 239).

1 *Jones Law of Ev.*, § 362.
Louisville, N. A. & C. Ry. v. Miller (Ind.), 37 N. E., 343.

The witness had a long familiarity and experience with wounds of all kinds, and was qualified to express an opinion.

No exception was taken to the court's ruling on defendant's objection and it cannot be considered (Trans., orig. pp. 238, 239).

Pool v. Lessee of Fleeger, 11 Pet., 185.
Phelps v. Mayer, 15 How., 160.

Assignment of Error 11.

(Trans., orig. p. 839.)

The question and answer tested the strength and security of the fastening on the gate under pressure, and

the completeness with which it filled up the opening. That one could not get through the opening when the particular gate in use was closed, was a fact within the personal knowledge of the witness, not an opinion, or conclusion (Trans., orig. pp. 248-250).

If it be considered an opinion, from the nature of the case it was admissible.

1 *Jones Law of Evidence*, § 362.
L., N. A. & C. Ry. v. Miller (Ind.), 37 N. E., 343.

The device was a railroad safety appliance, the witness was a railroad man of long experience, and it was competent to show his knowledge of the effect of the appliance. In any event it was without prejudice.

Assignment of Error 12.

(Trans., orig. p. 840.)

The question, as finally explained, tended to show how rapidly the vestibuling appliance could be adopted, and was so answered (Trans., orig. p. 254). This was material and competent in view of the charge of negligence in not adopting some appliance, and in view of the fact that it had been in known practical use for six or seven years. The defense attempted was that defendant had used the utmost diligence in adopting this appliance (Trans., orig. pp. 651, 652). But there was no exception taken to the court's ruling on defendant's objection, and this assignment cannot be considered (Trans., orig. p. 254).

Poole v. Lessee of Fleeger, 11 Pet., 185.
Phelps v. Mayer, 15 How., 160.

Assignment of Error 13.

(Trans., orig. p. 840.)

The witness Gilbert was asked what the defendant had done in the way of vestibuling its cars *subsequent* to the killing of deceased, that is *since* the 13th day of November, 1898. The matter called for is so patently immaterial and incompetent that mere references to it is sufficient.

Furthermore, no exception was taken to the court's ruling (Trans., orig. p. 652), and it cannot be considered.

Pool v. Lessee of Fleeger, 11 Pet., 185.
Phelps v. Mayer, 15 How., 160.

Assignment of Error 14.

(Trans., orig. p. 840.)

The testimony called for was cumulative, other witnesses for defendant having testified to the same matter, and the court had a right to limit it (Trans., orig. pp. 736, 737, 317, 318).

3 *Jones Law of Evidence*, § 814.

The question called for the condition of the water, *prior* to the accident, and the matter so called for was, therefore, immaterial.

No exception was taken to the court's ruling, and, therefore, this assignment cannot be considered (Trans., orig. p. 405).

Pool v. Lessee of Fleeger, 11 Pet., 185.
Phelps v. Mayer, 15 How., 160.

Assignment of Error 15.

(Trans., orig. p. 841.)

This is without force. No testimony was offered by defendant as to what the *witness Humphrey* did as to assisting the deceased on to the train. Plaintiff made no objection to such testimony, nor did defendant take an exception to the court's ruling on such an objection (Trans., orig. pp. 495, 496).

Assignments of Error 20, 25, 26 and 27.

(Trans., orig. pp. 843, 846, 848.)

The rule of care governing the carrier of passengers is discussed on page 87 of this brief.

That the duty which the carrier is under, to observe this rule and exercise the care exacted, is a public duty, a duty which he owes to the public, and does not rest on contract, is undoubtedly true.

Grand Trunk Ry. v. Stevens, 95 U. S., 655.
Chi. M. & St. P. R. R. Co. v. Solan, 169 U. S., 135.
Munn v. People of Illinois, 94 U. S., 113.
Phila. & Read. R. R. Co. v. Derby, 14 How., 468.

There was no possible injury to the defendant in the court's stating that it was the public duty which the carrier was bound to perform in this case, and not the duty he owed the deceased, inasmuch as the duty in regard to care owed by the carrier to the public and to the deceased was absolutely identical. And inasmuch as the carrier owes to the passenger the *highest* degree of

care, any implication that the case might rest on other relations than those of passenger and carrier could not be to defendant's prejudice. The carrier's duty in regard to the care demanded in this particular case was very carefully and plainly defined by the court.

If there was any ambiguity in the instructions, the defendant should have had it corrected.

Ind. etc. R. Co. v. Horst, 93 U. S., 291.
Flanders v. Tweed, 16 Wall., 504.

Assignments of Error 21, 22.

(Trans., orig. pp. 843, 844.)

We presume that under these two assignments defendant will urge that the jury was instructed by the court that they might award exemplary damages in this case. The sentence set out in assignment 21 and contained also in assignment 22, referring to exemplary damages, is in paragraph six of the court's instructions, and is as follows:

"And in every such action the jury may give such "damages, pecuniary or exemplary, as under all the "circumstances of the case may to them seem just." (Trans., orig. p. 802.)

This sentence when read in connection with the instruction of which it forms a part, and with the whole of the charge, cannot by possibility be held to have conveyed to a jury of average intelligence that in *this* case they should or might give exemplary damages.

The charge must be taken as a whole and cannot be condemned because a single paragraph, taken alone, is erroneous or might be misleading, if the charge as a whole makes the meaning clear and conveys the correct rule.

Baltimore & P. R. Co. v. Mackey, 157 U. S., 72.
Railroad Company v. Gladmon, 15 Wall., 401.
Kerr, Murray Mfg. Co. v. Hess (C. C. A.), 98 Fed., 56.
Stewart v. Wy. Cattle Ranch Co., 128 U. S., 383.
Northern Pacific Ry. Co. v. Babcock, 154 U. S., 190.
Etna Life Ins. Co. v. Ward, 140 U. S., 76.

That the court had no intention of instructing the jury in this sentence as to what damages they might or should give in this particular case is at once manifest upon reading the whole of paragraph six.

In order that the plaintiff might bring their action in Washington, it was necessary that the law of Idaho, where the negligence and death occurred, should not conflict with the law of Washington in regard to the right to bring an action and recover damages, and to this point the court was addressing itself, and was explaining to the jury how it was that the plaintiffs could recover in the state of Washington for the negligence and death in Idaho. (*Stewart v. B. & O. R. R. Co.*, 168 U. S., 445.) For the purposes of this explanation, he showed that the statutes of both states permitted an action for death and a recovery of damages, and, in showing that the statutes of these states were similar,

he seems to have quoted the language bearing on the right of action and the recovery of damages verbatim from the statute of Washington, instead of from the statute of Idaho, and the jury was informed necessarily from the language that the court was stating in an abstract way the statutes of the two states for this purpose only.

Now, in this abstract way, and for this general purpose, the court used the language complained of, which states to the jury generally that juries, under these statutes, may give "pecuniary or exemplary" damages.

Assuming that the jury knew the peculiar technical, legal significance attaching to the word "exemplary," the court's language is that juries may give, under that law, "pecuniary *or* exemplary" damages, not pecuniary *and* exemplary damages. One or the other, by the court's language, may be given; not both. This is plain and unambiguous language, and the jury must be held to have received it as such, and not in any technical way. Now, having laid down the abstract proposition that under these laws one or the other kind of damages might be given in fitting cases, the court proceeds throughout the whole charge to instruct the jury clearly and unmistakably *which* of these two kinds of damages are to be given by them in *this* particular case. They are informed that in this particular case the fitting damages and those which are claimed by the plaintiffs, and those which are to be given by the jury, are pecuniary damages, compensatory damages; that the object of the suit is to make the plaintiffs whole. The

charge from beginning to end is saturated with this theory, upon which the case was tried, which is shown in the pleadings, in the testimony, and upon which the court clearly intended to direct a recovery, if recovery was had.

In paragraphs four and five of the instructions, preceding the use of the language complained of, the court states that this is an action of tort "for which the law "imposes the liability upon the wrongdoer to *render* "*compensation* to the injured party. Now this case be- "longs to the latter classification. It is an action of "tort; a wrong is charged against the defendant in the "case towards the plaintiffs, causing them injury *of* "*a pecuniary nature, entitling them to compensation in* "*money to make good* as far as it is possible *the loss* "*which they have sustained of a pecuniary charactar.* "* * * The law endeavors to give *just compensation* "for an injury of *a pecuniary nature*, so you will regard "this case as one in which *the rights of the plaintiffs* "*depend* upon the truth of the charge which they make "against the defendant of having committed a wrong "towards them, which resulted in an injury to them "*of a pecuniary nature.*"

Immediately following the sentence complained of, referring to "pecuniary *or* exemplary" damages, the court again states which of these damages may be recovered by the plaintiffs in this particular case under the law which the court in an abstract way has just quoted. "Under this law the plaintiffs have a right of action to recover *compensation for their own loss.*" (Par. 7.)

And in the next paragraph (8) the court refers to the pleadings which were sent to the jury room and says: "The rights of the parties which they contend for are stated by them in their pleadings." Nowhere in the pleadings are exemplary damages asked for, and "the rights of the parties" which the court refers to as being set out in the pleadings, so far as plaintiffs are concerned, are stated to be compensation for losses to them.

In paragraph 31 of the charge, the court says: "They "are not seeking to recover anything for the physical "pain which he suffered, but they are complaining "of an injury to them by being deprived of his support, "and the pecuniary benefit which his life was to them." The same thought is conveyed in paragraph 32 of the charge.

In paragraph 38 of the charge the court, beyond the possibility of mistake, defines and restricts within fixed limits the character of damages which the jury may give in this particular case, as follows:

"You are instructed that, if you find for the plaintiffs, "or either of them, you will allow them, or either of "them, *such* damages as you deem to be reasonably "sufficient to make good to the plaintiffs, or either of "them, *the pecuniary loss to them* or either of them, "caused by the death of Jay H. Adams. This *pecuniary* "*loss* is not limited to a present money loss, but in de- "termining *it* you may consider any evidence before "you tending to show what was the reasonable expecta- "tion of *pecuniary benefits* to the plaintiffs, or either of

"them, from a continuance of his life. By pecuniary "benefits is meant any benefits having a pecuniary or "money value."

The court then enumerates the elements which may be considered as entering into the pecuniary loss, to compensation for which the verdict is thus restricted. This single basis for a recovery is further emphasized in paragraphs 39 and 40 of the charge.

Finally, in paragraph 55, in closing his charge to the jury, and as the last thought and direction regarding damages in the charge, the court definitely instructs them to restrict their verdict to actual compensation for actual pecuniary loss:

"If you come to a conclusion in favor of the plain- "tiffs, then you have the further duty to assess the dam- "ages, governed by the principles which I have already "given you, *and render a verdict for such sums of money "as in your judgment may be a just compensation for the "pecuniary loss of each.*" (Trans., orig. p. 824.)

We submit that it is most patent that the court had no intention to and did not instruct the jury that in this case they might give exemplary damages, nor could a jury of average intelligence have been misled by anything in the charge into such an impression.

Chicago & N. R. Co. v. Whitton, 13 Wall., 270.

The charge is not even ambiguous in this particular; but even if the charge as a whole could be urged as am-

biguous on this point, the ambiguity, if by any torturing of the language in the charge it can be said to exist, could have been as clearly seen at the time of its delivery as now, and no request was made by the defendant to the court to have the ambiguity removed.

"Courts are not inclined to grant a new trial merely "on account of ambiguity in the charge of the court "to the jury, where it appears that the complaining "party made no effort at the trial to have the point ex- "plained."

Flanders v. Tweed, 16 Wall., 504.
Baltimore P. R. Co. v. Mackey, 157 U. S., 86.
Ind. & St. L. R. Co. v. Horst, 93 U. S., 291.

The very moderate amount of damages found by the jury in this case, in view of the uncontradicted evidence, upon the amount of loss, prohibits any supposition that examplary damages may have been given (Trans., orig. pp. 205-209, 215, 216, 224-230, 288-290, 285, 291, 292, 296, 297, 293, 294). There is no contradiction anywhere in the record of the evidence introduced by plaintiffs as to the amount of pecuniary loss suffered by them. Viewed in the light of this evidence, the verdict is a very moderate verdict as compensation for the actual losses sustained by the plaintiffs.

Where upon the merits justice has been done, the judgment should not be reversed because the jury, in reaching a righteous verdict, may be presumed to have, by possibility, done so upon an erroneous theory.

Atwater v. Whitman, 41 Fed., 427.
W. B. Grimes Dry Goods Company v. Malcom, 58 Fed., 670.
Eddy v. Lafayette, 49 Fed., 813.
Eddy v. Lafayette, 163 U. S., 456.
Sanger v. Flow, 48 Fed., 152.

Assignment of Error 39.

(Trans., orig. p. 850.)

This assignment of error is a criticism of the thirty-third paragraph of the court's charge.

The court, as heretofore shown, has unmistakably instructed the jury that the basis of recovery, and the only basis of recovery in the case that they can consider, is the pecuniary loss suffered by the plaintiffs. This basis of recovery is conspicuously established in the case, beyond the possibility of being overlooked or ignored. The court says in this instruction that, in determining this pecuniary loss, there is no "fixed measure" and no "artificial rule" by which the damages in a given case can be computed (Trans., orig. p. 850). How this can be considered other than the plain truth, we cannot conceive. Where the fixed measure is by which to compute the widow's loss, or the son's loss, or where the artificial rule is to compute them by, we are wholly at a loss to determine. There is no usual, customary, market value or market rate for the benefits flowing from the husband to the wife, or from the father to the son; no customary or usual value attaching to the widow's maintenance and support.

There is no contract price which might be referred to as a "fixed measure" or artificial rule"; there is no difference between the value, at the time of a contract and the time of its breach, of an article to be sold thereunder, that might be relied on as a "fixed measure" or an "artificial rule."

Balt. & P. R. Co. v. Mackey, 157 U. S., 92.

With the basis of recovery fixed beyond shaking in the jury's mind, namely, the actual pecuniary loss suffered, the "sound sense and good judgment" of the jury is the only reliance in fixing the "amount of damages." Who or what else can determine the amount? In view of the rigidity with which the court has restricted the jury to actual pecuniary loss in determining the amount of damages, a reliance on their good sense and sound judgment could not be a direction to them to give damages for injured feelings or anguish or mind. But the court has expressly excluded this from their consideration in paragraph five of the charge where he says:

"It is not practicable to take cognizance in a court of "justice of those injuries which are sentimental, and "affect the feelings and sentiments; but the law en- "deavors to give just compensation for an injury of a "pecuniary nature. So you will regard this case as one "in which the rights of the plaintiffs depend upon the "truth of the charge which they make against the defen- "dant, of having committed a wrong towards them which "resulted in an injury to them of a pecuniary nature."

There is no error in the instruction complained of under this assignment.

Ill. Central R. R. v. Barron, 5 Wall., 90.
2 *Ballinger's Annotated Codes and Statutes of Washington*, § 4828.
Revised Statutes of Idaho, § 4100.

Assignment of Error 31.

(Trans., orig. p. 852.)

There is no error in the instruction complained of in this assignment, which deals with the measure of damages.

Louisville E. & St. L. R. Co. v. Clark, 152 U. S., 242.
Ill. Central R. Co. v. Barron, 5 Wall., 90.
Baltimore & P. R. Co. v. Mackey, 157 U. S., 92.
Tilley v. Hudson R. R. R. Co., 24 N. Y., 471.
Serenson v. N. P. R. R. Co., 45 Fed. Rep., 407.
Nebraska City v. Campbell, 67 U. S., 590.
Collins v. Davidson, 19 Fed. Rep., 83.

Assignment of Error 32.

(Trans., orig. p. 853.)

The court takes judicial notice of the expectancy of life, as shown by standard life tables. The competency of these tables as evidence to aid the jury in determining the probable length of time the plaintiff, Louis H. Adams, would have received pecuniary benefits from the deceased will not be questioned.

In view of the unquestionable competency of such tables and of the fact that their contents cannot be disputed, the rule applicable is aptly stated in *State v. Moffatt*, 73 Me., 278:

"What can be established by indisputable proof may "be acknowledged without proof; what is notorious "needs no proof."

The court merely stated to the jury what the probable expectation of life was according to these tables. This was not error.

Gordon v. Tweedy, 74 Ala., 232; s. c., 49 Am. Reps., 813.

Atchison, Top. & S. F. Ry. Co. v. Ryan (Kan.), 64 Pac., 603.

McHenry v. Yokum, 27 Ill., 160.

Shover v. Myrick, 4 Ind. App., 7; s. c., 30 N. E., 207.

Eastabrook v. Hapgood, 10 Mass., 313.

Wager v. Schuyler, 1 Wend., 553.

Jackson v. Edwards, 7 Paige, 387.

Davis v. Standish, 26 Hun, 608.

Schell v. Plumb, 55 N. Y., 592.

Louisville etc. R. Co. v. Mothershed, 97 Ala., 261; s. c., 12 So. Rep., 714.

Kansas City etc. R. Co. v. Philips, 98 Ala., 159; s. c., 13 So. Rep., 65.

McDonnell v. Alabama Gold Life Ins. Co. (Ala.), 5 So. Rep., 120.

Scheffler v. Minneapolis etc. R. Co., 32 Minn., 518; s. c., 21 N. W. Rep., 711.

People v. Ins. Co., 78 N. Y., 114.
1 *Jones Law of Evidence*, § 130.
Alexander v. Bradley, 66 Ky. (3 Bush.), 667.
Abel v. Penn. Mut. Life Ins. Co., 18 West Va., 400.
Price v. Conn. Mut. Life Ins. Co., 48 Mo. App., 281.
Lincoln v. Power, 151 U. S., 436.

If error, it was without prejudice. As was said in *Miller v. Dumon* (Wash.), 64 Pac., 840:

"It would hardly seem, from the instructions as a "whole, that the jury could have been misled, nor does "their very moderate verdict so indicate."

It was Not Necessary to Plead or Put in Proof the Statute of Idaho.

(Assignment of Error 22, Trans., orig. p. 844.)

It was urged below that the statute of Idaho was not pleaded or put in evidence, and the case of the *Union Pacific Ry. Co. v. Wyler*, 158 U. S., 285, was relied on in this connection for a reversal. This fact was also called to the attention of this court in petitioner's petition for the writ of certiorari, as showing grievous error.

The case of *Union Pacific Ry. v. Wyler*, 158 U. S., 285, is sharply and fundamentally distinguished from the case at bar in the following particulars:

The complaint first filed in the Wyler case stated a good cause of action at the common law, viz., the retention by a master, with knowledge, of an incompetent servant and injury thereby to plaintiff. There was no room there for any presumption that it rested elsewhere.

There was no statute in Missouri on which it *could* rest, and the general or common law governed there. This was a distinct and fully stated cause of action at the common law, and from this a departure was made. There was no cause of action stated in the complaint at bar known to the common law. By no possibility from it can a common-law action or an intention to rely on a common-law action be inferred. There is a statute of the state which provides for the action (1 *Ball. Code*, § 4828) and a statute makes the common law silent where the statute speaks (*Sayward v. Carlson*, 1 Wash., 40, 41).

The court, in the case being considered, says: "It "seems impossible to conceive of language which could "more directly rest the cause of action on the general "or common law of master and servant." But in the case at bar, the action for death was utterly unknown to the common law and if brought at all it *had* to rest on statute. The court rests its conclusion in the Wyler case, that, in changing to a reliance on a statute from an action unmistakably originally brought as a common-law action, there was a departure, largely on the conclusion of the Georgia supreme court, but that court has squarely held that where the statute of the state of the forum authorized the action, amending in the statute of the state where the injury happened is not a departure, and does not constitute a new cause of action. It is manifest that where the statute of the forum authorizes the action, and there is no room for inference as to a common-law action, as in the case at bar, the amending in of the statute of the other state is but add-

ing one fact of a group going to make up the cause of action already pleaded.

The South Carolina Railroad Company v. Nix, 68 Georgia, 572.

We call attention to the close parallelism of this case with the case at bar, in contradistinction to the many radical differences between the latter and the Wyler case, some of which we have pointed out.

The case at bar not being a common-law action, and there being no departure by relying on statute law, as the complaint was obviously drawn to do, and the suit being brought in the federal court and not in the state court, the remarks regarding judicial notice of statutes in the Wyler case have no application, and it was neither necessary to plead or to offer to prove the statute of Idaho, it appearing that the killing occurred in that state. It was the duty of the federal court to administer the law of that state without its being pleaded or offered in evidence. The federal courts take judicial notice of the laws of the several states.

Covington Drawbridge Co. v. Shepherd, 20 How., 227.

Lamar v. Micou, 114 U. S., 218.

Owings v. Hull, 9 Pet., 607.

If it be assumed however, that the statute of Idaho should have been pleaded, we have shown that the complaint in the case at bar could have been amended in that respect, and, therefore, we submit, under the circumstances

of this case, it will be considered amended by this court.

The complaint was not demurred to, nor at any stage of the proceedings, in any way, was the omission therefrom of the Idaho statute pointed out or complained of.

Assignment of error No. 22 does not direct attention to the pleadings. The action was tried *both times* and throughout all of its stages on the theory that the laws of Washington and Idaho concurred in authorizing it, but there was never any demurrer or criticism of the pleading. At the argument in the Circuit Court of Appeals was the first suggestion of any defect there.

The defendant was not ignorant of the bearing of the Idaho statute in the very action being prosecuted. The existence of the statute could not be questioned. The question of pleading, not having been raised in the trial court, cannot be raised for the first time in this court. As was said by this court:

"It was in the power of the court to permit the petition "to be amended, and the proper amendments would "doubtless have been made if the objection had been "stated. It is presented for the first time in this court.

"Under these circumstances it must be held to have "been waived by the plaintiffs in error in the court be- "low, and they are concluded by that waiver in this court.

"There is another ground upon which this exception "must be overruled. It is not alleged that the findings "of the court were unwarranted by the proofs, nor that "the judgment does not conform to the law and justice "of the case, as the case is thus presented.

"The objection is purely technical. It lies wholly in "the variance between the averments of the petition and "the facts as found by the court. The thirty-second "section of the Judiciary Act of 1789, declares that the "courts of the United States, respectively, shall proceed "and give judgment according as the right of the cause "and the matter in law shall appear unto them, without "regarding imperfections, defects, or want of form in "such writ, declaration or other pleading, return process, "or judgment or course of proceeding whatsoever, ex- "cept those only in case of demurrer, which the party "demurring shall specially set down and express, to- "gether with his demurrer as the cause thereof."

Railroad Company v. Lindsay, 4 Wall., 650.
Van Ness v. The Bank, 13 Pet., 17.
Ewing v. Howard, 7 Wall., 499.

The case at bar was begun in the federal court and this rule operates without restriction.

It was variance at most when the court by taking judicial notice of the statute of Idaho put it in evidence (Trans., orig. p. 802). It could not have misled defendant and was not material.

Under the code of Washington, no variance is ma- "terial unless it shall have actually misled the adverse "party *to his prejudice* in maintaining his action or "defense *upon the merits.*" (2 *Ball. Code of Wash.*, § 4949.)

The code is further in accord with the Judiciary Act of 1789, by providing (2 *Ball. Code of Wash.*, § 6535):

"The supreme court shall hear and determine all causes "removed thereto in the manner hereinbefore provided, "upon the merits thereof, disregarding all technicalities, "and shall, upon the hearing, *consider all amendments* "*which could have been made as made.*"

Allend v. Spokane Falls etc. Co., 21 Wash., 324.

It would clearly appear to be a palpable miscarriage of justice, both under the ruling of this court and under the laws of the state of Washington, if a reversal should follow what at most can only be urged as a technical defect in the pleading, which could not, and did not, work any prejudice to the defendant.

Respectfully submitted,

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